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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 328

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY, APPELLANTS,

vs.

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

No. 329

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, PETITIONER,

vs.

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY.

APPEALS FROM AND WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED AUGUST 14, 1935.

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APPEAL FROM AND WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1945.

[fol. 1] **IN THE SUPREME COURT OF ARKANSAS**

No. Series 7527

OTHO A. COOK, Commissioner, Substituted for Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, Appellant,

vs.

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellees

STIPULATION OF THE PARTS OF RECORD TO BE INCLUDED IN THE TRANSCRIPT—Filed July 6, 1945

It is stipulated and agreed by and between Scott Wood, Counsel for Warren W. Wilson, et al., Appellants in the Supreme Court of the United States, and Herrn Northcutt, Counsel for Appellee in the Supreme Court of the United States, that the following portions of the record are indicated under the provisions of Rule 10, to be included in the transcript:

1. Complaint in the Garland Chancery Court.
2. The answer of the Commissioner of Revenues of the State of Arkansas.
3. The stipulation of the plaintiffs and the defendants in the Garland Chancery Court.
4. The Timber Sales Agreement, which is Exhibit "A" to the stipulation, omitting that part appearing at pages 43 to 49, inclusive, of the transcript in the Supreme Court of Arkansas.
5. The Decree of the Garland Chancery Court.
6. Opinion and judgment of the Supreme Court of Arkansas.
7. The petition for re-hearing in the Supreme Court of Arkansas, and its filing date.
8. Order overruling petition for re-hearing in the Supreme Court of Arkansas, with date.
9. Petition for allowance of appeal to the Supreme Court of United States, and assignment of errors.
10. Allowance of appeal and date.
11. Supersedeas bond on appeal, with approval and date.

[fol. 2] 12. All statements filed under the provisions of Rules 9, 10 and 12, of the Supreme Court of the United States.

13. Acknowledgment of service of:

(a) Petition for appeal.
(b) Order allowing allowance of appeal.
(c) Appeal bond.
(d) Assignment of errors.
(e) Jurisdictional statement under Rule 12, and statement calling attention to Paragraph 3, of Rule 12.

14. Motion to dismiss in part.
15. Petition for cross appeal.
16. Order allowing cross appeal.
17. Appeal bond of cross appellant.
18. Assignment of errors.
19. Statement of points to be relied upon by cross appellant.
20. Waiver as to citation to appellant.
21. Acknowledgment of receipt by appellant of:

(a) Cross petition for appeal.
(b) Order allowing cross appeal.
(c) Copy of cross appeal bond.
(d) Assignment of errors.
(e) Statement of points relied upon by cross appellant.
(f) Waiver of citation and service on appellant
(g) Statement as to jurisdiction.
(h) Motion to dismiss in part.

22. Statement by cross appellant as to jurisdiction with motion to affirm in part.

Scott Wood, Herrn Northcutt.

[File endorsement omitted.]

[fol. 3] IN THE CHANCERY COURT OF GARLAND COUNTY

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO and Lelia F. Craigo, Partners Doing Business as Wilson Lbr. Co., Plaintiffs,

vs.

MARION ANDERSON, as Sheriff of Garland County, Arkansas; and John E. Jones as Clerk of the Circuit Court of Garland County, Arkansas, Defendants

COMPLAINT—Filed January 11, 1943

1. The plaintiffs, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo, and Lelia F. Craigo, are partners doing business in Garland County, in the State of Arkansas, under the firm name of Wilson Lumber Company; the defendant, Marion Anderson, is sheriff of Garland County, Arkansas; and the defendant John E. Jones, is clerk of the circuit court of Garland County, Arkansas.

2. The plaintiffs are and were at the times hereinafter mentioned engaged in the business of severing timber from the soil and converting same into lumber and doing wholesale and retail lumber business.

3. The plaintiffs, in carrying on their business, have complied with all of the laws of the State of Arkansas and have paid to the State of Arkansas all sums due the State for the privilege of severing timber from the soil; but notwithstanding the fact that the plaintiffs have paid the state all the privilege taxes and state taxes, the Commissioner of Revenues of the State of Arkansas did on the 22nd day of December, 1942, file in the office of the clerk of the circuit court of Garland County, Arkansas, his certificate claiming that the plaintiffs are indebted to the State of Arkansas in the following sums, to-wit:

for 6,298,854 feet of timber severed from the soil between January 1, 1937, and October 1, 1942 at 7¢ per thousand	$440.92
25% penalty	110.23
Total	$551.15

[fol. 4] And the defendant, John E. Jones, as clerk of the circuit court of Garland County, Arkansas, has filed the

said certificate in the manner provided by Section 8440 to Section 8442 inclusive of Pope's Digest of the Statutes of Arkansas.

4. The alleged claim of the State of Arkansas against these plaintiffs has been made on account of the fact that the plaintiffs, during the time named, have severed timber from lands belonging to the United States situated within the national forests in the State of Arkansas, said lands being under the exclusive control and jurisdiction of the United States.

5. All of said timber for which the alleged claim of the State of Arkansas is being made was cut by the plaintiffs by contract executed by and between the United States of America and these plaintiffs under and by virtue of the authority granted by Acts of Congress authorizing sale of timber in the national forests; and the State of Arkansas, by its said demand against the plaintiffs, is seeking to interfere with the title, rights and privileges which were granted to the plaintiffs by the United States; and the state's demand against the plaintiffs is in violation of the Acts of Congress above referred to.

6. The defendant, John E. Jones, as clerk of the circuit court of Garland County, has issued an execution against the plaintiffs based on the said certificate of the Commissioner of Revenues of the State of Arkansas, and said execution has been placed in the hands of Marion Anderson, the Sheriff of Garland County, Arkansas; and the said sheriff, unless he is enjoined by this court, will seize property of the plaintiffs under said execution.

7. The certificate of the Commissioner of Revenues of the State of Arkansas above referred to has been filed and indexed on the judgment docket of the circuit court of Garland County as transcript judgment number 445; and the [fol. 5] same is a cloud on the title of all the real property belonging to the plaintiffs in Garland County; and the said demand of the State of Arkansas is an illegal and void exaction within the meaning of Section 13, Article 16 of the Constitution of the State of Arkansas, and is in violation of the second paragraph of Section 3, Article 4, and Article 6, Clause 2 of the Constitution of the United States.

Wherefore, the plaintiffs pray that the defendant, Marion Anderson, as sheriff of Garland County, be enjoined from

seizing any of the plaintiffs' property under said void execution; that the said execution be cancelled; that the said certificate issued by the Commissioner of Revenues of the State of Arkansas be canceled; that the said transcript judgment number 445 on the record of the circuit court of Garland County be canceled and removed as a cloud on the title to the plaintiff's real property; and that a temporary order be issued herein enjoining the sheriff from seizing any of the plaintiff's property under said execution; and for costs and other relief.

Murphy & Wood, by Scott Wood, Attorneys for plaintiffs.

[File endorsement omitted.]

[fol. 6] IN THE CHANCERY COURT OF GARLAND COUNTY

[Title omitted]

ANSWER—Filed June 22, 1943

Comes now Murray B. McLeod as Commissioner of Revenues for the State of Arkansas and a party defendant herein and for answer to the complaint of the plaintiffs would state:

1. Defendant admits allegation No. 1 of the plaintiff.

2. Defendant admits allegation No. 2 of the plaintiff.

3. Defendant denies that the plaintiffs have complied with all the laws of Arkansas nor have paid to said State all sums due for severing timber from the soil, but does admit that the defendant has filed its certificate of indebtedness as alleged by the complaint.

4. Defendant denies allegation No. 4 of the plaintiff.

5. Defendant denies allegation No. 5 of the plaintiff.

6. Defendant admits allegation No. 6 of the plaintiff.

7. Defendant denies allegation No. 7 of the plaintiff.

Wherefore, defendant prays the court to dismiss the complaint of the plaintiffs for want of equity for its costs expended and for all other relief to which it is entitled in the premises.

Herrn Northcutt, Solicitor for Defendant; Murray B. McLeod, Commissioner.

[File endorsement omitted.]

[fol. 7] IN THE CHANCERY COURT OF GARLAND COUNTY

[Title omitted]

STIPULATION OF FACTS—Filed February 1, 1944

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, partners doing business as Wilson Lumber Company, by their solicitors, Murphy & Wood; and Murray B. McLeod as Commissioner of Revenues of the State of Arkansas by his solicitor, Herrn Northcutt, do hereby stipulate as follows:

1. The court shall consider the facts set out herein to be the evidence in the case and may render judgment on the merits of the cause upon the facts as agreed to herein.

2. The Commissioner of Revenues of the State of Arkansas is the proper party to this action and may be declared a party defendant hereof.

3. The allegations containing in paragraphs 1 and 2 of the plaintiff's complaint are true.

4. That the Commissioner of Revenues of the State of Arkansas has filed a certificate of indebtedness as alleged in paragraph 3 of plaintiff's complaint.

5. That the claim of the State of Arkansas is based on the fact that plaintiffs have severed timber in the United States National Forest under several contracts executed at different times and entered into by plaintiffs and the United States Department of Agriculture. All of said contracts were substantially in the form of the written contract hereto attached and marked Exhibit "A", which was executed February 28, 1940, except as to amounts, quantities, descriptions of lands, dates, etc.

6. The statements contained in paragraph 6 of plaintiff's complaint are true.

[fol. 8] 7. The statements of fact contained in paragraph 7 of the plaintiff's complaint are true; but the State does not agree to the conclusions of law therein set forth.

8. All Acts of Congress relevant to the issues involved may be read from U. S. C. A. of U. S. Revised Statutes, or other recognized publications without complying with any formal legal requirements.

9. It is further agreed and stipulated that without waiving the right to object to any evidence as incompetent, immaterial or irrelevant that upon five days notice to the opposing party depositions may be taken relative to the following:

(a) The form of the advertisements that were published by the Department of Agriculture with respect to the severing of the timber that is involved in this action.

(b) The time allowed for severing and removing said timber.

(c) That the plaintiff, Wilson Lumber Company, was required to pay $0.15 per thousand feet for a cooperative fund to be used in fire prevention, making roads, etc., in the national forests.

(d) That it has been customary for lumber dealers in the Ouachita National Forest area ever since the severance tax statute was enacted to pass the tax on to the respective owners of lands from which timber was cut.

(e) That no effort was ever made by the state to collect severance tax on timber cut from the national forest until about the year 1939, and that lumber dealers did not make reports to the State of Arkansas respecting timber cut in the national forest, and no such reports were demanded by the State of Arkansas, and the State, prior to 1939, did not require lumber dealers to apply for a license to cut such timber.

Murphy & Wood, Solicitors for Plaintiffs, by Scott Wood.

[fol. 9] Herrd Northcutt, Solicitor for Defendant.

[fol. 10] EXHIBIT "A" TO STIPULATION

United States Department of Agriculture, Forest Service

17247

S
Sales—Quachita
Wilson Lumber Company
3-4-40
Hot Springs Working Circle
Reservoir Block I, Area B

3—328-329

Timber Sale Agreement

Forest Service, U. S. Department of Agriculture

M-5123 8-7417

[fol. 11] This page to be initialed by Mr. Wilson.

Form 202, Page 1 -Revised March 1927).

United States Department of Agriculture

8Afs—3348

S Forest Service W. W. W.

Sales—Ouachita

Wilson Lumber Company

3-4-40 Timber Sale Agreement

(Designation) Hot Springs Working Circle.

Reservoir Block I, Area B.

Description of Timber.—1. I, Warren W. Wilson, an individual doing business under the firm name of Wilson Lumber Company, having an office and principal place of business at Hot Springs, State of Arkansas, hereinafter called the purchaser, hereby agree to purchase from an area of about 2300 acres to be definitely designated on the ground by a Forest officer prior to cutting, in Sections 11, 12, 13, 14, 22, 23, 24, 26, 27, 28, 33 and 34, Township 1 South, Range 21 West, Fifth Principal Meridian, within the Ouachita National Forest, as definitely designated on the attached map which is hereby made a part of this agreement, (give also legal subdivision if surveyed, and approximate legal subdivisions if unsurveyed) at the rate or rates and in strict conformity with all and singular the requirements and conditions hereinafter set forth, all the dead timber standing or down and all the live timber marked or designated for cutting by a Forest officer, merchantable as hereinafter defined for sawlogs. (Name products to be cut, saw logs, ties, etc.)

Timber upon valid claims and all timber to which there exists valid claim under contract with the Forest Service is exempted from this sale. The estimated amount to be cut under the methods of marking described in Section 4 is

3,000 MBM log scale of shortleaf pine, (Give by species and quantity in proper unit of measure, state whether live or dead, and kind of material) more or less.

[fol. 12] Payments.—2. The purchaser hereby agrees to pay to the Regional Fiscal Agent, U. S. Forest Service, Atlanta, Georgia, or such other depository or officer as shall hereafter be designated, to be placed to the credit of the United States, for the timber at the following rates:

Form 202, Page 2 (Revised Mar. 1927).

Ten and 35/100 dollars ($10.35) per thousand feet b. m. (per thousand feet b. m., cords, linear feet, etc.)

Material unmerchantable on account of size, removed at the option of the purchaser, will be paid for at the same rate as merchantable material.

Payment shall be made in advance installments of not less than One Thousand dollars ($1,000.) and not more than Five Thousand dollars ($5,000.) each as determined by the Forest Officer in charge and when called for by him, except just before the completion of the sale when the amount of the payment may be reduced in writing by the Forest Supervisor, credit being given for the sums, if any, heretofore deposited with the United States depository or officer in connection with this sale.

Period of Contract.—3. Unless extension of time is granted, all timber shall be cut and removed and the requirements of this agreement satisfied on or before June 30, 1942. (Date)

Marking.—4. Live timber shall be marked for cutting as follows: Merchantable live timber shall be marked for cutting by paint spots below stump height or by blazing below stump height and stamping "U. S." upon the blaze at the option of the Forest Supervisor. All trees so marked shall be cut. Merchantable and shortleaf pine timber shall be cut whether marked or not. (insert suitable provision so that the system of cutting and method of designation will be clear)

4a. The system of marking has been indicated by sample [fol. 13] marking and accepted by the purchaser, and future marking shall follow the methods and principles so exemplified.

Form 202, Page 3 (Revised March 1927).

Merchantability.—5. Any tree which in the judgment of the Forest Officer contains one or more logs, merchantable as hereinafter defined, may be marked or designated for cutting as a merchantable tree.

6. All shortleaf pine logs are merchantable which are not less than 10 feet long, at least 8 inches in diameter inside bark at the small end, and after deductions for visible indications of defect scale 33⅓ percent of their gross scale; and have a net scale of at least 20 board ft.: Provided that firm red heart, sap stain and sound rich butts shall not be regarded as defects. (Name defects for which deductions will not be made in scaling.-

Material unmerchantable on account of defects may be removed without charge in the discretion of the Regional Forester.

Scaling.—7. Material shall be piled or skidded for scaling, measurement, or count if required by the Forest officer in charge and in such manner as he shall direct. The title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted.

Saw logs shall be scaled by the Scribner Decimal C log rule, at the small end on the average diameter inside bark taken to the nearest inch.

8. The maximum scaling length of saw logs shall be 16 feet; greater lengths will be scaled as two or more logs. Upon all logs 4 inches shall be allowed for trimming. Logs overrunning the specified trimming allowance shall be scaled not to exceed the next foot in length.

8a. Logging operations shall be so conducted as to permit [fol. 14] scaling to be done economically, and timber or logs from private or State land shall not be mixed at the point of scaling with timber or logs from government land.

8b. If required by the Forest Officer in charge, the purchaser shall plainly mark the length of each log on the small end with other than black crayon.

8c. Logs shall be arranged for scaling in connection with the use of any loading device in accordance with the directions of the Forest Officer in charge, in the manner most

practicable for the purchaser consistent with economical scaling by Forest Officers.

8d. Scaling shall be done as often as a minimum of 350 logs are available for scaling.

8e. On request, copies or abstracts of the scale reports will be furnished to the purchaser after they have been approved by the Supervisor.

Form 202, Page 4 (Revised Jan. 1937).

Logging.—As far as may be deemed necessary for the protection of National Forests interests, the plan of logging operations on the sale area shall be approved by the Forest Supervisor or by the officer to whom he may have delegated authority to give this approval. Operations begun on any natural logging area shall be completed in accordance with the terms of this agreement before cutting may begin on other areas, unless such cutting is authorized in writing in which event cutting shall be completed on the area left unfinished as soon as practicable. After decision in writing by the Forest officer in charge that the purchaser has complied satisfactorily with the contract requirements as to specified areas, the purchaser shall not be required to do additional logging or slash disposal work on such areas.

10. Any method of logging other than by means of animals, motor trucks and trailers or railroad may be employed only with the advance approval in writing of the [fol. 15] Forest officer approving this agreement and under such conditions and restrictions as he may require. (Indicate approved and expected methods as "horses and caterpillar tractors with not more than two tractors hauling to one loading place.")

11. As far as practicable all branches of logging shall keep pace with one another, and in no instance shall slash disposal be allowed to fall behind cutting, except when the depth of snow or other adequate reason makes proper disposal impracticable, when the disposal of slash may, with the written consent of the Forest officer in charge, be postponed until conditions are more favorable.

12. The purchaser shall cut all and only marked or designated live trees and shall remove all merchantable logs

from the sale area. No timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured, or counted by a Forest officer.

13. No unnecessary damage shall be done to young growth or to trees left standing. Unmarked or undesignated trees which are badly damaged in logging shall be cut if required by the Forest officer in charge.

14. On those portions of the sale area on which felling has been or is being done, marked or designated trees left uncut, and unmarked or undesignated trees which contain merchantable material and which are cut, injured through carelessness, or killed by fires which the purchaser, his employees, contractors, or employees of contractors caused, or the origin or spread of which he or they could have prevented, shall be paid for at double the current price, fixed by the terms of this agreement, for the class of material said trees contain: Provided, that such payment shall not release the purchaser from liability for any damage to the United States other than the value of said trees. Timber wasted in tops or stumps, marked or designated timber broken by careless felling, and any timber merchantable, [fol. 16] according to the terms of this agreement, which is cut and not removed from any portion of the cutting area when operations on such portion are completed, or before this agreement expires or is otherwise terminated, shall be paid for at the current price for such material. The amounts herein specified shall be regarded as liquidated damages and may be waived in the discretion of the Forest officer in charge in accidental or exceptional cases which involve small amounts of material. Unless extension of time is granted by the Forest Supervisor the right, title and interest to any timber for which payment has been made under the provisions of this section shall revert to the United States without compensation unless it shall have been removed from any portion of the sale area accepted by the Forest officer in charge within the 3 months next succeeding the date of such acceptance, or from the remainder of the sale area during the same number of months next succeeding the date of expiration or termination of this agreement.

15. Stumps shall be cut so as to cause the least practicable waste, and not higher than 12 inches on the side adja-

cent to the highest ground, except that when this requirement is impracticable in the judgment of the Forest officer, he may authorize or accept higher stumps; all trees shall be utilized to as low a diameter in the tops as practicable and to a minimum diameter of 8 inches when merchantable. The log lengths shall be varied so as to secure the greatest possible utilization of merchantable material. (Specify different diameters for different species, if necessary.)

15a. Trees may be long butted sufficiently to remove material unmerchantable under the terms of this agreement for sawlogs.

Form 202, Page 5 (Revised Mar. 1927).

[fol. 17] Brush Disposal.—16. Slash shall be disposed as follows:

Tops of all shortleaf pine trees shall be lopped so that all limbs and material four inches and over in diameter at the large end shall be close to the ground, and material less than four inches in diameter at the large end shall be scattered evenly over the ground and not over eighteen inches deep, but no material shall be left within four feet of living trees of merchantable species, as required by the Forest officer in charge.

Form 202, Page 6 (Revised Mar. 1927).

Fire precautions.—17. During the time that this agreement remains in force the purchaser shall independently do all in his power to prevent and suppress forest fires on the sale area and in its vicinity, and shall require his employees, contractors, and employees of contractors to do likewise. Unless prevented by circumstances over which he has no control, the purchaser shall place his employees, contractors, and employees of contractors at the disposal of any authorized Forest officer for purpose of fighting forest fires, with the understanding that unless the fire-fighting services are rendered on the area embraced in this agreement or on adjacent areas (Describe by topographic features or as a belt of a specified width around the sale area) within one-half mile of the exterior boundary of the sale area, shown on the attached map, which is a part of this agreement, payment for such services shall be made at rates to be determined by the Forest officer in charge, which rates shall not be less than the current rates of pay

prevailing in the said National Forest for services of a similar character: Provided, that the maximum expenditure for fire fighting without remuneration in any one calendar year, including the furnishing of special trains and other special service as required at rates of pay determined as above, shall not exceed $300.00; And provided [fol. 18] further, That the purchaser, his employees, contractors, or employees of contractors caused or could have prevented the origin or spread of the said fire or fires, no payment shall be made for services so rendered, nor shall the cost of such services be included in determining said maximum expenditure for any calendar year.

18. Except in serious emergencies as determined by the Forest Supervisor the purchaser shall not be required to furnish more than 6 men for fighting fires outside of the area above specified, and any employees furnished shall be relieved from fire fighting on such outside areas as soon as it is practicable for the Forest Supervisor to obtain other labor adequate for the protection of the National Forest.

19. During periods of fire danger, as may be specified by the Forrest officer in charge, the purchaser shall prohibit smoking and the building of camp and lunch fires by his employees, contractors, and employees of contractors within the sale area except at established camps, and shall enforce this prohibition by all means within his power: Provided, That the Forest officer in charge may designate safe places where, after all inflammable material has been cleared away, camp fires may be built for the purpose of heating lunches and where, at the option of the purchaser, smoking may be permitted.

19a. During periods of exceptional emergency, created by hazardous climate conditions or otherwise, the Forest Supervisor, or officer to whom he may have delegated authority for this purpose, shall require such additional patrols or other emergency measures as he may determine to be necessary to meet the situation, which requirements, as far as practicable, shall be set forth in the fire plan for the sale area; and if, in the judgment of the Forest Supervisor, other precautions are not adequate, or if the operator shall [fol. 19] not comply with the emergency measures required, the Supervisor or other authorized officer shall have au-

thority to close down such machines or such portions of the logging operations as, in his judgment, should be discontinued during the period of the emergency or until the emergency requirements are met by the operator.

19b. During such periods as the Forest Officer in charge may specify, no camp refuse, or brush, slash or debris, such as that resulting from clearing around camps or on rights-of-way, shall be burned without consent of the Forest Officer in charge.

19c. The purchaser shall furnish and shall maintain suitable sealed boxes each containing: 1 Axe DB, 6 Potato Hooks or Council Rakes, 6 large pails or buckets, 1 four-quart canteen, 1 five-gallon spray pump, 1 shovel, 1 lantern, 1 extra globe, 1 gallon kerosene, at each camp used in logging the timber covered by this agreement. The purchaser shall also furnish and maintain suitable sealed tool boxes each containing the tools listed above, in such numbers and so located that no crew of 6 or more men will be working at any time at a distance of more than one-half mile from a tool box. Each locomotive, loader or other steam logging engines used in logging or construction work in connection with this sale shall be equipped with suitable sealed tool boxes each containing the tools listed above. The said tools shall not be used for any purpose except fighting forest fires, and shall be kept in serviceable condition. The boxes shall be plainly marked with paint to indicate that the tools in them are to be used for no other purposes except fighting forest fires.

Form 202—Page 6a.

19d. A spark arrester satisfactory to the Forest Officer in charge shall be maintained on the stack of the sawmill boiler during such periods as he may require. The mill [fol. 20] site and the ground for a distance of 200 feet from the marginal limits thereof shall be cleared of all inflammable material, including dead trees, before the mill is set up and thereafter this space shall be kept clear of all brush, dry grass or other inflammable material other than sawed products, so long as the mill operates. Slabs, if not burned or hauled away currently, shall be placed sufficiently apart from the sawdust, in the judgment of the Forest Officer in charge, so that they can be burned separately, and shall

be burned as and when directed by the Forest Officer in charge and not otherwise.

Form 202—Page 7 (Revised Mar. 1927).

Occupancy and Improvements.—The purchaser is authorized to build, on National Forest land, sawmills, camps, railroads, roads, and other improvements necessary in the logging or the manufacturing of the timber included in this agreement: Provided, That all such structures and improvements shall be located and operated subject to such regulations by the Forest officer in charge as may be necessary for the protection of National Forest interests. The continuance or operation of such improvements on National Forest land after this agreement has terminated shall be subject to authorization by permit or easement under United States laws, and unless such authorization is secured all improvements not removed shall become the property of the United States at the expiration of six months from the termination of this agreement.

21. All merchantable Shortleaf Pine Timber used in the construction of buildings, roads, and other structures, necessary in connection with the cutting and removal of the timber covered by this agreement, shall be paid for at the current rates for such material under this agreement.

22. The purchaser shall keep all logging camps, mills, [fol. 21] stables, and other structures used in connection with this sale, and the ground in their vicinity, in a clean, sanitary, condition, and rubbish shall be removed and burned or buried. When camps or other establishments are moved from one location to another or abandoned, the purchaser shall burn or otherwise effectively dispose of all debris and abandoned structures.

23. All telephone lines, ditches, and fences, located within or immediately outside the exterior boundaries of the sale area, shall be protected so far as possible in logging operations and, if injured, shall be repaired immediately by the purchaser, and the Forest Supervisor may, when in his judgment it is necessary, require the purchaser to move any such telephone line or fence from one location to another. Roads and trails shall at all times be kept free of logs, brush, and debris resulting from the purchaser's operations hereunder, and any road or trail used by the pur-

chaser in connection with this sale that is damaged or injured beyond ordinary wear and tear through such use shall promptly be restored by him to its original condition.

23a. All camp buildings and structures used in connection with this sale shall be located and operated as may be required by the Forest Officer in charge to prevent the pollution of the water in any stream. Outhouses, toilets and garbage pits shall be constructed and maintained so as to prevent, so far as is possible, the breeding of flies or the development of insanitary conditions.

23b. The purchaser agrees to employ at all mills on privafe land supplied wholly or in part with timber cut under this agreement, and at all camps on private land maintained in connection with the performance of this agreement, such fire control and sanitation devices and measures as are being required in connection with similar improvements located on National Forest land, such devices [fol. 122] and measures to be subject to the approval of the Forest Officer in charge.

23c. Merchantable post oak, black oak, red or black gum and unmerchantable tops of other species may be used without charge, for the construction of buildings, roads and other structures necessary in connection with the cutting and removal of the timber covered by this agreement. Timber used for such improvements will be left in place where used.

24. Other Conditions. (Insert other conditions if any are necessary) In order to check the spread of tree disease and to improve the cond-tion of the stand, the purchase shall cut all dead and diseased trees marked or designated for cutting on the s-ale area whether merchantable or apparently unmerchantable. Such trees after felling shall be opened sufficiently to satisfy the Forest Officer in charge of their contents and any portions thereof which are merchantable shall be scaled and paid for and may be removed by the purchaser.

Form 202—Page 8 (Revised September 1936).

25. Exchanges of Land and Timber.—The purchaser, desiring to cooperate with the Department of Agriculture in carrying out the purposes of the act of Congress approved

March 20, 1922 (42 Stat. 465), and other land-exchange acts of like purpose, agrees that any portion of the timber covered by this agreement may, in the discretion of the Secretary of Agriculture, be granted to a third party in exchange for private lands conveyed to the United States under said acts where such party agrees to sell timber to said purchaser at the prices stipulated in this agreement or which may have been established in accordance with its terms; and further agrees that in such event he will purchase said timber from the party to whom granted at the price or prices per thousand board feet, or other unit of measurement stipulated in this agreement or which may have been established in accordance with its terms, and will [fol. 23] cut and remove such timber and dispose of the slash therefrom in strict accordance with the requirements and provisions of this agreement; it being mutually understood and agreed that all timber so cut and removed shall be credited against the maximum or minimum periodic cuts prescribed by section 3 of this agreement. Payment for such timber sh-ll be remitted to the regional fiscal agent of the Forest Service, at Region 8, Atlanta, Ga. or other designated depository, upon notification by the Forest Supervisor and in the amounts not exceeding the maximum established by section 2 of this agreement. If title to the conveyed land is finally accepted by the Secretary of the Interior the said fiscal agent will pay to the owner of said land the amount deposited to cover the value of the timber granted in lieu thereof, but if title to the conveyed land is not accepted by the Secretary of the Interior the said fiscal agent will credit the amount deposited to this timber sale as a payment. All privileges of selecting, cutting, and removing timber covered by this agreement, which by this section are conceded to third parties, shall be equally available to the purchaser under the terms and conditions set forth herein, except that prior deposit of the value of the selected timber shall not be required in cases where the purchaser is also the owner of the conveyed land unless the purchaser desires to cut and remove the selected stumpage before title to the conveyed land is finally accepted by the Secretary of the Interior, in which event the value of the timber to be cut must be deposited as in the case of third parties but will be refunded or applied as a timber-sale payment if and when the exchange is consummated by acceptance of the offered land.

Form 202—Page 9 (Revised March 1938).

(In the following sections, continue the numbering serially [fol. 24] from the last number used on the preceding page.)

26. At all times when logging operations are in progress the purchaser shall have at the main camp for his employees working on the scale area, a representative who shall be authorized to receive, on behalf of the purchaser, any or all notices and instructions in regard to work under this agreement given by the forest officer in charge, and to take such action thereon as is required by the terms of this agreement.

27. Complaints by the purchaser as to any action taken by a forest officer respecting this agreement shall not be considered unless made in writing within thirty (30) days of such action to the Forest Supervision having jurisdiction. The decision of the Secretary of Agriculture shall be final in the interpretation of the regulations and provisions governing the sale, cutting and removal of the timber covered by this agreement.

28. All operations on the sale are, including the removal of scaled timber, may be suspended by the forest officer in charge, in writing, if the conditions and requirements contained in this agreement are disregarded, and failure to comply with any one of said conditions and requirements, if persisted in, shall be sufficient cause for the termination of this agreement: Provided, That the Chief, Forest Service, may, upon reconsideration of the conditions existing at the date of sale and in accordance with which the terms of this agreement were fixed, and with the consent of the purchaser, terminate this agreement, but in the event of such termination the purchaser shall be liable for any damages sustained by the United States arising from the purchaser's operations hereunder.

29. All records pertaining to the purchaser's logging operations and milling business shall be open to inspection at any time for a forest officer authorized by the Regional Forester to make such inspection, with the understanding [fol. 25] that the information obtained shall be regarded as confidential.

30. The term "officer in charge", whenever used in this agreement signifies the officer of the Forest Service who

shall be designated by the proper supervisor to supervise the timber operations in this sale.

31. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company. (Sec. 3741, Rev. Stat., And Secs. 114-116, act of Mar. 4, 1909.)

32. This agreement shall not be assigned in whole or in part.

33. The conditions of the sale are completely set forth in this agreement, and none of its terms can be varied or modified except in writing by the forest officer approving the agreement or his successor or superior officer, and in accordance with the regulations of the Secretary of Agriculture. No other forest officer has been or will be given authority for this purpose.

34. And as a further guarantee of a faithful performance of the conditions of this agreement, the purchaser delivers herewith a bond in the sum of twenty-five hundred dollars ($2,500.00), and further agrees that all moneys paid under this agreement shall upon failure on his part to fulfill all and singular the conditions and requirements herein set forth, or made a part hereof, may be retained by the United States to be applied as far as may be to the satisfaction of his obligations assumed hereunder. The purchaser further agrees that should the sureties on the [fol. 26] bond delivered herewith or on any bond delivered hereafter in connection with this sale become unsatisfactory to the officer approving this agreement, the purchaser will, within thirty (30) days of receipt of demand, furnish a new bond with sureties solvent and satisfactory to the approving officer.

35. Signed in triplicate this 28th day of February, 1940.

(Same date as bond.)

(Corporate seal, if corporation.)

[fol. 27] IN THE CHANCERY COURT OF GARLAND COUNTY

No. 17,247

WARREN W. WILSON, et al, Plaintiff,

MARION ANDERSON, SHERIFF, et al, Defendants

DECREE—June 27, 1944

On this 27th., day of June, 1944, come the plaintiff by their Solicitors, Murphy & Wood, and comes Murray B. McLeod, Commissioner of Revenues of the State of Arkansas by his Solicitor, Herrn Northcutt; and it appearing to the court that due service of process by summons issued on the complaint herein for the time and in the manner prescribed by law against the defendants, John E. Jones as Clerk of the Circuit Court of Garland County, Arkansas, and Marion Anderson as Sheriff of Garland County, Arkansas, has been made in this cause; and this cause, being reached on the regular call of the calendar, is submitted to the court for its consideration and judgment upon the complaint of the plaintiffs, the motion and intervention filed by Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, answer of Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, the depositions of Warren W. Wilson, taken on behalf of the plaintiffs, dated February 10, 1944, the deposition of J. D. Waldrip, taken on behalf of the defendant, dated February 21, 1944, the stipulation made by the Solicitors of the parties hereto and filed on February 1, 1944, and the affidavit of Warren W. Wilson, dated April 19, 1944, with the stipulation attached thereto. The court being well and sufficiently advised as to all matter of law and fact arising herein, finds:

[fol. 28] That the Arkansas severance tax, if it be applied to timber severed from the National Forest pursuant to agreements such as those introduced in evidence in this cause between the United States and the persons severing said timber, would be a tax upon the operations of the Government of the United States and a tax on the right of the United States to harvest the mature timber on its national forest; and the Arkansas severance tax does not apply to the timber severed by the plaintiffs from the National Forest.

The court does, therefore, consider, order, adjudge and decree that the certificate filed by the Commissioner of Revenues of the State of Arkansas in the office of the clerk of the Circuit Court of Garland County, Arkansas, claiming that the plaintiffs are endebted to the State of Arkansas for severance tax for timber severed by the plaintiffs is void; that the execution issued upon the said certificate by the clerk of the Circuit Court of Garland County, Arkansas, is void; and that said certificate and execution are canceled and set aside.

To the findings and the ruling of the court, the defendants timely objected and excepted and had same noted of record and then prayed an appeal to the Supreme Court of Arkansas, which is by the court granted.

[fol. 29] IN THE SUPREME COURT OF ARKANSAS

COOK, COMMISSIONER OF REVENUES v. WILSON

OPINION—April 2, 1945

McFADDEN, J.:

The question presented is whether the state may collect from the purchaser and severer the severance tax on timber cut from lands belonging to the United States in a national forest.

Appellees are partners trading under the firm name of Wilson Lumber Company; and at various times they have severed timber in the United States national forest under "Timber Sale Agreement" with the United States Department of Agriculture. One such agreement was introduced; it is quite lengthy, but the salient provisions are: (1) The "purchaser" (appellee) agreed to purchase from a certain area in the national forest "all of the dead timber standing or down and all of the live timber marked or designated for cutting for a forest officer, merchantable as hereinafter defined for saw logs." (2) Merchantable live timber was to be marked for cutting by paint spots. (3) The purchaser agreed to deposit certain sums of money with the United States depository, to be credited against the purchase of the timber in the agreement; and the purchase price was $10.35 per thousand feet board measure. (4) After the

timber was cut, the logs were to be arranged for scaling as often as a minimum of 350 logs was available; and when scaled, and the price of the particular lot determined, then the price of that lot was to be charged against the deposit made by the purchaser to the depository as previously mentioned. (5) The agreement recited that "the title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted." And, furthermore, that "no timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured or counted [fol. 30] by a forest officer." (6) In addition to cutting removing, and paying for the merchantable timber, the purchaser was also, under supervision of the forest officer, to cut and remove all dead or diseased timber, and dispose of it, from the acreage involved in the contract; and the purchaser was to participate, by payments and/or man power, in fighting forest fires. The logging camp and details of operation were prescribed in the contract. The purchaser, furthermore, made a fidelity bond for the faithful performance of the contract.

The Commissioner of Revenues filed his certificate in Garland County (Sec. 13384 Pope's Digest) claiming that the appellees owed the State of Arkansas the severance tax (and penalty) on the timber cut and removed by the appellees from the national forest under the said Timber Sale Agreement. The appellees filed suit in the Garland Chancery Court to enjoin the sheriff from serving execution issued on the certificate, and appellees claimed immunity from the tax because the timber came from lands of the national forest. The State Commissioner of Revenues intervened as a defendant in the suit, and sought to sustain the tax. The chancery court denied the claim of the state to collect the severance tax, and this appeal challenges that decree and presents the points herein discussed.

I. *Was the Arkansas Severance Tax law Intended to Apply to Persons Severing Timber from Lands of the United States in a National Forest?* We answer this question in the affirmative. The original severance tax act was Act 118 of 1923. It has been frequently amended, and some of the amendatory acts are: Act 283 of 1929, Acts 116 and 138 of 1933, and Act 158 of 1937. The act, with amendments, may be found in Section 13371 *et seq.* of

Pope's Digest. Briefly, the Act: (1) Levies a tax on the business of severing timber (Section 13371; (2) requires the severer or "producer" to obtain a permit from the state, and make regular reports (Section 13372); (3) provides [fol. 31] that the tax shall remain a lien on each unit of production, and the tools and equipment used in the severing (Sections 13372 and 13376); (4) requires the reporting taxpayer to withhold the tax from the proceeds of the severed products (Section 13382); (5) provides that the severed resources shall not be removed until the tax is paid (Section 13386).

The act contains only two exemptions, to wit: (1) Section 13374 provides that the act shall not apply to any individual owner of timber "who occasionally severs or cuts from his own premises such stocks, logs, poles, or other forest products, as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use, and not for sale, commercial gain, or profit." (2) Section 13375 provides an exemption "that no tax herein levied shall apply to the producer of switch ties, who hews out or makes such switch ties entirely by hand."

These are the only two exemptions found in the Severance Tax Law. The listing of these two exemptions necessarily excluded all other exemptions under the well known rule of *expressio unius est exclusio alterius.* St. L. I. M. & S. Ry. v. Branch, 45 Ark., 524; Chisholm v. Crye, 83 Ark. 495, 104 S. W. 167; 25 C. J. 220; 59 C. J. 984, 50 Am. Juris. 455. We reach the conclusion that the act levies a uniform tax on the business of severing timber in all instances except the two exemptions mentioned, and therefore it was the intent of the Legislature to apply the law to all other cases; and the tax would apply to the case at bar, as the transaction here involved does not come within either exemption.

II. *Does the Immunity of a Federal Government Instrumentality Inure to the Benefit of the Appellees?* It is fundamental that the Federal Government and its instrumentalities are exempt from state taxation. McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Wheat. 738; Thompson v. U. P. R. R. 9 Wall (U. S.) 579; Weston v. [fol. 32] Charleston, 2 Pet. 449; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429. On the other hand, the tax

immunity does not insure to a person, firm, or corporation merely because such claimant has a contract with, or a grant from, the Federal Government. Groves v. New York, 306 U. S. 466, 83 L. Ed. 927; James v. Dravo Construction Co., 302 U. S. 134, 82 L. Ed. 155; Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186, 82 L. Ed. 187; Alabama v. King, 314 U. S. 1, 86 L. Ed. 3; Penn. Dairies v. Milk Control Commission, 318 U. S. 261, 87 L. Ed. 748; Fox Film Co. v. Doyal, 286 U. S. 123, L. Ed. 1010.

Prior to James v. Dravo, supra, decided December 6, 1937, a tax like the one at bar might not have been sustained, because in Graves v. Texas., 298 U. S. 393, 80 L. Ed. 1236, and other cases, any effort to levy a tax that would ultimately fall on the Federal Government had been defeated. As was said by Mr. Justice Roberts in his dissenting opinion in James v. Davo, supra, that case marked a radical departure from previous decisions. So we start with James v. Davo, supra, and the companion case of Mason v. Washington, 302 U. S. 186, 82 L. Ed. 187, decided on the same day, as the beginning of the present rule of taxation in a case like the one at bar; and this rule is emphasized by Alabama v. King, supra, decided November 10, 1941.

In James v. Dravo, supra, the Supreme Court of the United States upheld the Gross Sales and Income Tax Law of West Virginia, which levied an annual privilege tax "on account of business and other activities." The tax was on the business of contracting, and was 2% of the gross income. The Dravo Construction Company was a Pennsylvania corporation domesticated in West Virginia, and engaged in four contracts with the United States for the construction of locks and dams on the Ohio and Kanawha Rivers. The Supreme Court of the United States said that there were two questions: (1) whether the state had [fol. 33] territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden on the operations of the Federal Government.

(1) As to territorial jurisdiction, the court held that the State of West Virginia still had the right of taxation on activities located on the lands acquired by the United States by purchase or condemnation for the purpose of the improvement, reasoning: that even though the State of West Virginia had agreed to the U. S. Government's acqui-

sition of title to the land, nevertheless, the State of West Virginia still retained its residuum of legislative jurisdiction; and that the United States held lands within the State for public purposes, but that ownership did not withdraw the lands from the jurisdiction of the State. Emphasis was placed on the terms of cession. It was pointed out that the State, in reserving the right to issue process, did not lose the right to tax an independent contractor; and that the Dravo Construction Company was an independent contractor, and could be taxed with respect to its activities carried on on the lands owned by the United States.

(2) As to whether the tax was invalid, as a burden on the Federal Government, the court held that the Dravo Construction Company was an independent contractor, that the tax was not laid on the contract of the *u*nited States, but was laid on the business of the Dravo Construction Company, and that the West Virginia tax, so far as it was laid upon the gross receipts of the Dravo Construction Company, did not interfere in any substantial way with the performance of the Federal Government, and was a valid exaction.

In Mason v. Washington, supra, the tax was practically the same: a tax on a contractor engaged in building the Grand Coulee dam on the Columbia River. The tax was called an occupation tax. In that case the United States Government had acquired title to approximately 840 acres, and all of the work of the Mason Company was on that land. But the court held that when the United States ac- [fol. 34] quired title to the land, it did not deprive the state of its residuum of legislative authority. The court uses these words:

"The question * * * is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority in- including its taxing and police power in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to affect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise." The court held that

when the United States acquired the lands, the State of Washington did not lose the residuum of jurisdiction.

We proceed now to test the case at bar against: (A) territorial jurisdiction, and (B) burden on government operations, as outlined in the two cases from the United States Supreme Court just mentioned.

(A) *Territorial Jurisdiction.* The federal legislation covering national forests is found in U. S. C. A. Title 16, Section 471, et seq. The federal statutes show that national forests are established in two ways: (a) by presidential proclamation declaring certain lands of the public demain to be a national forest. This is under Section 471 and only includes lands that had never passed from the United States. (See Light v. U. S., 220 U. S. 523, 55 L. Ed. 570.) (b) The purchase or acquisition of other lands under Section 516. These lands are acquired by the Federal Government only after the Legislature of the State has consented to such acquisition. This Section 516 is the Act of Congress of March 1, 1911.

Regarding timber severed from lands incorporated into the national forest by presidential proclamation under Section 471, 34 hold that the State has no right to collect [fol. 35] the severance tax because the State never had the "residuum of jurisdiction," as that language is used in the cases of James v. Dravo and Mason v. Washington, supra. Appellant claims that U. S. C. A. Title 16 Section 480 gives the State the right to impose the tax in such a case. We construe that Section as allowing civil and criminal jurisdiction, but not allowing taxation.

Regarding timber severed from lands incorporated into the national forest by *acquisition* under Section 516, we hold that the State has the right to collect the severance tax, so far as territorial jurisdiction is concerned, because the State has the "residuum of jurisdiction." The Arkansas Legislature, by Act No. 148 of 1917, and by Act No. 108 of 1927 (see Sections 5656-7 Pope's Digest), gave the consent of the State of Arkansas to the acquisition by the United States of lands for the establishment, consolidation, and extension of national forests as provided by the Act of Congress of March 1, 1911, "provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that

civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed." A comparison of Section 5656-7 of Pope's Digest with the West Virginia statutes shown in the case of James v. Dravo, supra, leads to the inevitable conclusion that the State of Arkansas still retains its residuum of jurisdiction over lands that became a part of the national forest under U. S. C. A. Title 16 Section 516.

Appellees, in their claim for tax immunity, cite C. O. & G. Ry. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, and Oklahoma v. Barnsdall, 296 U. S. 521, 80 L. Ed. 366. Each of these cases involved a severance tax levied by the State [fol. 36] of Oklahoma on minerals from Indian lands, and in each case the tax was not permitted. We distinguish these cases in two ways, (1) these cases were decided prior to James v. Dravo, and (2) in these cases, the minerals were held by the United States government as a trustee for Indian tribes. The State of Oklahoma had never ceded the lands to the United States government, and therefore has no "residuum of legislative authority." The original title was in the United States as trustee for the Indians, and that original title in the United States prevented the State from exercising any tax rights without the permission of the United States.

(B) *Burden on Governmental Operations.* In their claim that no tax is due the State, appellees contend that cutting the timber was a federal matter, and the appellees operated as a federal instrumentality, and to impose a tax upon the appellees would be an indirect tax on a federal operation or instrumentality. We hold that the appellees, in cutting and removing the timber, acted as independent purchasers, and not as a government instrumentality, and that this is not a tax on governmental operations. In James v. Dravo, supra, and in Mason v. Washington, supra, the construction company was in each instance an independent contractor, and the tax was permitted. In Alabama v. King, supra, the contractor was buying supplies on a "cost-plus" contract, and a state sales tax was held to be collectible. In each case the claim for tax immunity was the same as the claim made by the appellees in the case at bar.

Here the appellees were outright purchasers and severers, and therefore far more distinctly independent than were the contractors taxed in the cases just mentioned.

The Arkansas severance tax is a privilege tax or license tax; and is levied on the business of severing. Section 13371 Pope's Digest; Floyd v. Miller Lumber Co., 160 Ark. 17, 254 S. W. 450; same case on second trial, 169 Ark. 473, 275 S. W. 741; McLeod, Commissioner v. K. C. S. R., 206 Ark. 281, 175 S. W. 2d 391.

[fol. 37] The Arkansas severance tax is in no sense an ad valorem tax, so the case of U. S. v. Alleghany County, 322 U. S. 186, 88 L. ed. (adv. opn.) 845 has no application. The Arkansas severance tax is nondiscriminatory, as has been previously shown. It taxes, alike, all who sever timber for commercial gain, just as the appellees do here, since they are engaged in the lumber business. In the case of Buckstaff Co. v. McKinley, 198 Ark. 91, 123 S. W. 2d 802, there was an effort to avoid a state tax, on the plea of governmental agency, and we said:

"Imposition of the tax here does not, in any sense, interfere with the government's business."

The United States Supreme Court, in affirming the case (308 U. S. 358, 84 L. ed. 322) said:

"The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter."

In James v. Dravo, supra, the Court quoted from F. & D. Co. v. Pennsylvania, 240 U. S. 318, 60 L. ed. 664:

"Mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."

See also Collins v. Yosemite, 304 U. S. 518, 82 L. ed. 1502. So we hold that the appellees are not entitled to claim any tax immunity as a governmental instrumentality, or because of governmental operations, and are liable for severance tax on all timber cut from land that became a part of the national forest by governmental acquisition under U. S. C. A. Title 16 Section 516.

III. *Was There any Ruling by the State Revenue Commissioner that Now Prevents the State from Enforcing the State Severance Tax?* Finally, appellees argue that the State should not now be allowed to collect the severance tax on timber cut from any lands in a national forest, because from 1923 to 1939 the State made no effort to collect any such [fol. 38] tax from these appellees. No ruling of the Commissioner of Revenues is pleaded or proved, but it is argued that the failure of the State to make earlier demands now operates as a bar against the present demand. Executive construction of a statute is entitled to consideration by the courts, and should not be disregarded except for cogent reasons, or unless clearly erroneous. 59 C. J. 1027; 25 R. C. L. 1045; 42 Am. Jurs. 392 et seq.; Moses v. McLeod, 180 S. W. 2d 110. But there are several reasons why appellees cannot sustain their contention about an executive construction:

In the first place, no affirmative ruling of the Commissioner of Revenues was pleaded or proved. The most that the appellees claimed was that *they* had not paid the tax from 1923 to 1937. Whether other persons similarly situated had paid the tax was not shown. The failure of the Commissioner of Revenues to pursue appellees earlier cannot be used as a defense when suit is undertaken within the period of limitations. Secondly, if there had been an administrative ruling, it would yield to a judicial construction, when the ruling was shown to be erroneous. As stated in Am. Juris. 398:

"A construction of doubtful correctness may be sustained, but one manifestly wrong or clearly erroneous cannot be upheld." Thirdly, from the passage of the Severance Tax Law in 1923 until the decision by the United States Supreme Court in James v. Dravo, supra, in 1937, the State Commissioner of Revenues might have thought that liability would not be sustained because of decisions of the United States Supreme Court in cases like Green v. Texas Co., 298 U. S. 393, 80 L. ed. 1236, and such earlier cases as Dobbins v. Erie County, 16 Peters 435, 10 L. ed. 1022; Collector v. Day, 11 Wallace 118, 20 L. ed. 122. The tax had all the time been levied by legislative action, but remained uncollected. The innovation of the decision of [fol. 39] James v. Dravo, supra, is pointed out by Mr. Justice Roberts in his dissenting opinion. The State of Ar-

kansas should not now be deprived of its tax because the Commissioner of Revenues failed for a number of years to collect the tax, not anticipating the decision of the United States Supreme Court in James v. Dravo, supra. Finally no administrative ruling of the Commissioner of Revenues of the State of Arkansas (and none has been shown) has worked prejudice to the appellees in the case at bar, because the tax here involved originated by reasons of transactions in 1940, and any delay from 1923 to 1937 has not prejudiced the appellees regarding a 1940 tax liability.

To Summarize and Conclude, we hold:

1. That the appellees are not liable to the State for severance tax on timber severed by them from lands held by the United States as original owner (U. S. C. A. Title 16 Section 471); and to that extent the decree of the chancery court is affirmed;

2. That the appellees are liable to the State of Arkansas for severance tax and penalty on all timber severed by them from lands acquired by the United States under the Act of Congress of March 1, 1911 (U. S. C. A. Title 16 Section 516). The stipulation in the record in this case shows that such severance tax and penalty is $276.35; and the decree of the chancery court as to this, is reversed, and decree is rendered here for the State of Arkansas and against the appellees for said amount of $276.35 with interest from this date until paid.

The Chief Justice dissents as to the reversal.

[fol. 40] IN THE SUPREME COURT OF ARKANSAS

JUDGMENT—April 2, 1945

This cause having heretofore been decided by the Court on February 19, 1945, and the opinion delivered on that day withdrawn on the Court's own motion, and the judgment entered upon the opinion set aside,

Now on this day the Court hands down a new opinion and the following judgment is entered thereon, to wit:

This cause came on to be heard upon the transcript of the record of the chancery court of Garland County and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in so much of the

proceedings and decree of said chancery court as held that the appellees are not liable to the State for the severance tax on timber severed by them from lands held by the United States as original owner.

It is therefore ordered and decreed by the court that so much of said decree be and the same is hereby affirmed with costs.

But it is further the opinion of the court that there is error in so much of the decree of said chancery court in this cause as held that appellees were not liable to the State for severance tax and penalty on all timber severed from lands acquired by the Government under Act of Congress of March 1, 1911, and so much of said decree is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and it appears that the parties have stipulated that if there is any tax liability for timber severed from lands held by the United States by acquisition, then such liability is $276.35.

It is therefore ordered and decreed by the court that the appellant recover of said appellees, the sum of Two Hundred Seventy Six Dollars and Thirty Five Cents ($276.35), with interest on said sum at the rate of 6% per annum from this date until paid.

It is further ordered and decreed that said appellant [fol. 41] recover of said appellees all his costs in this court, in this cause expended, and have execution thereof. Griffin Smith, C. J., dissents as to the reversal.

[fol. 42] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed March 8, 1945

Come the appellees, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, and petition the court to reconsider the opinion rendered herein on the 19th day of February 1945, and grant a rehearing of this cause for the following reasons:

I

The court erred in holding that the tax was not a direct tax on the United States.

II

The court erred in holding that the tax did not interfere with the government's business.

III

The court in its opinion herein indicates that both the legislative and executive departments of the State of Arkansas, prior to the decision in James v. Dravo Construction Company, 302 U. S. 134, which was decided December 6, 1937, construed the severance tax law as not applying to timber severed from the United States national forests. The opinion also indicates that such was the general opinion with respect to the application of the severance tax law. The court, therefore, erred in holding that the severance tax statute does apply to the timber severed in the national forests.

IV

The court, in its opinion, holds that severance tax applies to timber severed from lands within the national forests which were acquired by the United States by purchase with the consent of the state, and that it does not apply to timber severed from lands held by the United [fo 43] States as original owner. The certificate filed by the state in the office of the clerk of the Circuit Court of Garland County does not allege that any of the timber which is included in the certificate was severed from lands which were acquired by the United States under the provisions of Title 16, Section 516, U. S. C. A. Since the state does not claim that the timber was severed from the lands which were acquired by the United States by purchase with the consent of the state, the state is not entitled to have an execution issued on its claim; and the Chancery Court of Garland County properly enjoined the sheriff from levying the execution upon appellees' property.

For the reasons stated above, the appellees petition the court to reconsider the opinion heretofore rendered in this cause, and to affirm the decree of the chancery court of Garland County. But if the court holds that the decree should not be affirmed in its entirety, appellees petition the court to affirm the decree of the chancery court of Garland County insofar as it enjoins the sheriff from levying execu-

tion on appellees' property and remand the cause, with directions to permit the appellant to amend its claim and certificate filed in the office of the clerk of the circuit court of Garland County, by stating what it claims as severance tax on account of timber severed from lands which were purchased by the United States with the consent of the state.

Respectfully submitted, Scott Wood, Solicitor for Appellees.

CERTIFICATE OF COUNSEL

Scott Wood states that he is the solicitor for the appellees, and believes that the foregoing petition for rehearing should be granted.

Scott Wood.

[File endorsement omitted.]

[fol. 44] IN THE SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—May 14, 1945

Rehearing Petitions Denied: Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

No. 7527—Otho A. Cook, Commr. v. Warren W. Wilson, et al.

[fol. 45] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR APPEAL—Filed July 6, 1945

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Arkansas in the above entitled cause, the appellees therein, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo, and Lelia F. Craigo, pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors.

Now come the appellees above named and file herewith their petition for an appeal and assign as error:

1. The Supreme Court of Arkansas erred in giving judgment reversing the judgment of the Chancery Court of Garland County, Arkansas, which held to be void the severance tax statute of the state of Arkansas, which laid a tax for the privilege of severing timber from the United States National Forests, while title to the said timber was in the United States, which act also required the persons having contracts with the United States for severing the said timber to secure from the state of Arkansas a permit or license before beginning the execution of their said contracts with the United States.

2. The Supreme Court of Arkansas erred in holding that the said severance tax law was not repugnant to the second clause of article 6 (supremacy clause) of the Constitution of the United States.

3. The Supreme Court of Arkansas erred in holding that the said severance tax statute was not repugnant to clause 2, section 3, article 4 of the Constitution of the United States, which provides that Congress shall have power to [fol. 46] dispose of and make all needful rules regulating the territory and other property belonging to the United States.

For Which Errors, the appellees herein pray that the said judgment of the Supreme Court of the State of Arkansas rendered in the above entitled cause on the 14th day of May, 1945 be reviewed by the Supreme Court of the United States and be reversed, and a judgment rendered for appellees herein and for costs.

Murphy & Wood, by Scott Wood, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 47] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 6, 1945

The appeal herein petitioned for is allowed and ordered upon the execution of a bond by the appellants in the United States Supreme Court, to the appellee, Otho A. Cook, Commissioner of Revenues of the State of Arkansas, in the sum of One Thousand ($1,000.00) Dollars, such bond when approved to act as a supersedeas.

Griffin Smith, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fols. 48-49] Supersedeas Bond on Appeal for $1,000.00 approved July 12, 1945, omitted in printing.

[fols. 50-51] Citation in usual form showing service on Herrn Northcutt, filed July 6, 1945, omitted in printing.

[fol. 52] IN THE SUPREME COURT OF ARKANSAS

CERTIFICATE OF LODGMENT

I, C. R. Stevenson, Clerk of said court, do hereby certify that there was lodged with me as such clerk on the filing dates shown on each paper the following: Petition for appeal; Allowance of appeal; Assignment of Errors and Prayer for reversal; Copy of bond; Citation and return; Statement showing jurisdiction; Service pursuant to Rule 12.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Ark., this 7th day of August, 1945.

C. R. Stevenson, Clerk, by A. G. Sadler, D. C.
(Seal.)

[fol. 53] IN SUPREME COURT OF ARKANSAS

RETURN TO ALLOWANCE OF APPEAL

In obedience to the commands of the within allowance of appeal I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this 7th day of August, 1945.

C. R. Stevenson, Clerk, By A. G. Sadler, D. C.
(Seal.)

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR CROSS-APPEAL.—Filed August 8, 1945

Otho A. Cook, Commissioner of Revenues for the State of Arkansas, appellant, to the Hon. Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas:

Otho A. Cook, as Commissioner of Revenues of the State of Arkansas, the petitioner herewith, feeling partially aggrieved by the judgment rendered in the foregoing entitled cause on April 2, 1945, hereby prays a cross appeal from said judgment to the Supreme Court of the United States, from that part of the judgment and for the reasons set forth in the assignment of errors filed herewith, and:

Prays that its cross appeal be allowed, that citation may issue as provided by law and that a transcript of the record and all the proceedings and documents upon which that judgment was rendered duly authenticated, be sent to the Supreme Court of the United States under the law and rules of such cases made and provided, and petitioner further prays that the proper order relating to the proper security therefor be made.

As in duty bound your petitioner will ever pray.

Herrn Northcutt, Attorney for Otho A. Cook, Commissioner of Revenues for the State of Arkansas.

[File endorsement omitted.]

[fol. 56] In the Supreme Court of Arkansas

[Title omitted]

Order Allowing Cross-appeal—Filed August 8, 1945

On the petition of Otho A. Cook, as Commissioner of Revenues for the State of Arkansas, it is ordered that the cross appeal to the Supreme Court of the United States in the City of Washington, D. C., upon the judgment heretofore filed and entered in the Supreme Court of Arkansas, on the 2nd day of April, 1945, be and the same is hereby allowed and it is further ordered that a certified copy of the transcript of the record and all other proceedings herein be forthwith transmitted to said Supreme Court of the United States; and, it is further ordered that a bond on cross appeal be fixed in the sum of One Thousand ($1,000.00) Dollars, conditioned as required by law, but without supersedeas.

This the 8th day of Aug. 1945.

Griffin Smith, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 57] Bond on cross appeal for $1,000.00 approved and filed Aug. 8, 1945, omitted in printing.

[fol. 58] In the Supreme Court of the United States

[Title omitted]

Assignment of Errors—Filed Aug. 8, 1945

Cross Appellant assigns as error the following:

The Supreme Court of Arkansas erred in ruling in its opinion of April 2, 1945, (L. Rep. Vol. 83, No. 1, Page 938), that the appellants, Warren W. Wilson, et al., are not liable to the State for Severance Tax on timber severed by them from lands held by the United States as original owner, (U. S. C. A. Title 16, Par. 471).

Herrn Northcutt, Attorney for Appellee and Cross-Appellant.

[File endorsement omitted.]

[fol. 59] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

WAIVER OF CITATION—Filed August 8, 1945

Scott Wood as Attorney for Warren W. Wilson, et al., hereby waives issuance of formal citation and service thereof and enters his appearance in the Supreme Court of the United States in the above entitled cause.

This the 8th day of August, 1945.

Scott Wood, Counsel.

[fol. 60] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61] IN THE SUPREME COURT OF THE UNITED STATES

No. 328

APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13—Filed August 27, 1945

Come the appellants, and file this as their statement of points relied on and designation of the parts of the record which they think necessary for the consideration thereof, under rule 13, paragraph 9.

Statement of Points

By contract with the United States, appellants agreed to cut and remove certain timber from the lands belonging to the United States in the national forests. The Arkansas severance tax statute levied a tax for the privilege of severing timber. Appellants insist that this statute, as applied to the severing of the timber by appellants in the national forests, is repugnant to the second clause of article 6 of the Constitution of the United States (supremacy clause), and is also repugnant to clause 2, section 3, article 4 of the Constitution, which provides that Congress shall have power to dispose of and make all needful rules regulating the territory and other property belonging to the United States. Appellants insist that the statute is unconstitutional and void for the following reasons:

A. The tax is a tax on the contract of the United States with appellants, which required appellants to sever the timber.

B. Under the contract between appellants and the United States, appellants were instrumentalities of the United States and immune from the tax.

C. The statute requires the appellants to pay the tax and collect it from the owner of the land at the time of severance, and subjects appellants to prosecution and fine for failure to do so; and the United States was the owner of the land at the time of severance.

[fol. 62] D. The statute requires the appellants to secure a license from the State of Arkansas before executing their contract with the United States, and subjects them to a fine for failing to do so, and requires them to make monthly reports to the state of Arkansas with respect to the execution of their said contract, and subjects them to a fine for failing to do so.

These requirements constitute a direct interference with appellants as instrumentalities of the government in the execution of their contract with the government.

Parts of Record to Be Considered

Appellants believe that it will be necessary for the court to consider the following portions of the record:

The complaint, the answer, the stipulation which was filed in the chancery court, except paragraphs numbered 7, 8, and 9, the contract between Wilson Lumber Company and the Department of Agriculture from the beginning to paragraph numbered 7, inclusive, also including paragraphs number 14 and 24 of said contract.

Respectfully submitted, Wm. J. Kirby, Little Rock, Arkansas, Counsel for Appellants.

[fol. 63] Proof of Service of Statement and Designation

State of Arkansas,
County of Garland:

I, Scott Wood, state that I was the attorney for the appellants in this cause in the Supreme Court of Arkansas, and that I did, on the 18th day of August, 1945, serve a copy of the foregoing statement and designation on Herrn

Northcutt, attorney for the appellee, by mailing a copy of said statement and designation to him at his office, C. Otho A. Cook, Commissioner of Revenues of the State of Arkansas, State Capitol, Little Rock, Arkansas.

Scott Wood.

Subscribed and sworn to before me this 23rd day of August, 1945. Nadia Mailhes, Notary Public. My commission expires Sept. 7, 1948. (Seal.)

[fol. 63a] [File endorsement omitted.]

[fol. 64] IN THE SUPREME COURT OF THE UNITED STATES

No. 329

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO RECORD PURSUANT TO RULE 13, SUB-DIVISION 9— Filed August 18, 1945

Cross appellant relies upon the following points:

The Supreme Court of Arkansas erred in ruling in its opinion of April 2, 1945 (L. Rep. Vol. 83, No. 1, Page 938), that the appellants, Warren W. Wilson, et al., are not liable to the State for Severance Tax on timber severed by them from lands held by the United States as original owner (U. S. C. A. Title 16, Par. 471).

U. S. C. A. Title 16, Par. 480, states that all criminal and civil jurisdiction, with certain exemptions, shall remain in the State and that no citizen shall be relieved of his obligations to the State by enactment of the Statute.

As to the designation of the record to be printed, same has been stipulated supra, and will not be repeated.

Herrn Northcutt, Attorney for Appellee and Cross-Appellant.

Service of the foregoing is hereby duly admitted this the 8th day of August, 1945.

Scott Wood, Counsel.

[fol. 64a] [File endorsement omitted.]

[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

Nos. 328 & 329

ORDER—October 8, 1945

In No. 328 further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits. In No. 329 the appeal is dismissed for want of jurisdiction, sec. 237 (a) of the Judicial Code as amended, 28 U. S. C., sec. 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by sec. 237 (c) of the Judicial Code as amended, 28 U. S. C., sec. 344 (c), certiorari is granted. In both cases the Solicitor General is invited to file a brief amicus curiae if he is so advised. In No. 328, counsel, without restricting their argument in any other respect, are requested to address themselves in their briefs and on oral argument to the following questions:

1. Does the record affirmatively show that the validity of a state statute was drawn in question in the Supreme Court of Arkansas on the ground of its being repugnant to the Constitution or laws of the United States as required by section 237 (a) of the Judicial Code (28 U. S. C., sec. 344)?

2. Does the record affirmatively show that the argument was made in the Supreme Court of Arkansas that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?

3. Assuming that question (2), supra, is answered in the negative, does this Court have jurisdiction to consider the argument that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States? Compare Dewey v. Des Moines, 173 U. S. 193, 198.

4. Do the assignments of error in this Court raise the question whether the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States? Compare Flournoy v. Wiener, 321 U. S. 253, 259.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this order.

Endorsed on Cover: File No. 50,031, 50,032. Arkansas, Supreme Court. Term No. 328. Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners doing business as Wilson Lumber Company, Appellants, vs. Otho A. Cook, Commissioner of Revenues for the State of Arkansas. Enter Thos. S. Buzbee. Term No. 329. Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner, vs. Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners doing business as Wilson Lumber Company. Filed August 16, 1945. Term No. 328, O. T. 1945; 329 O. T. 1945.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 328

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY,

Appellants,

vs.

OTHO A. COOK, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT AS TO JURISDICTION

WM. J. KIRBY,
SCOTT WOOD,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 328

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY,

Appellants,

vs.

OTHO A. COOK, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

Pursuant to Rule No. 12 of the Supreme Court of the United States, the appellees and complainants in the above entitled cause, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo, and Lelia F. Craigo (appellants in the Supreme Court of the United States), file their statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review judgment and decree appealed from herein, as follows:

A

The Statutory Provisions Believed to Sustain Jurisdiction

The statutory provisions believed to sustain the appellate jurisdiction are contained in section 237 of the Judicial Code, as amended (28 U. S. C. A., Section 344).

B

The State Statutes Which Are Involved

The statutes of the state that are involved are:

Pope's Digest of the Statutes of Arkansas, Section 13371 (section 1 of Act 118 of 1923), levying a "privilege or license tax" upon each person (called "the producer") engaged in the business of severing natural resources for commercial purposes from the soil or waters of the state;

Section 13372 of Pope's Digest, Volume 2, Page 3299, requiring any person desiring to engage in such business of severing to apply to the Commissioner of Revenues for a license or permit before entering upon such business, making his application on forms furnished by the Commissioner of Revenues, and requiring the applicant, before securing the permit, to expressly agree to abide by the provisions of the severance tax statute, and to pay the tax, and also providing that the applicant shall "expressly obligate himself to pay at the end of the ensuing monthly period the amount of the tax, and consent that such tax shall remain a lien on each unit of production until paid into the state treasury", and making it a misdemeanor punishable by fine for any person to engage in such business without making the application and securing the permit. (Section 2, Act 118 of 1923, as amended by Act 283 of 1929);

Section 13373 of Pope's Digest, Volume 2, Page 3299, requiring each "producer" (severer) to make monthly reports on forms furnished by the Commissioner of Revenues to the County Clerk and to the Commissioner of Revenues of the State of Arkansas, and making it a misdemeanor punishable by fine for any producer to fail to make these monthly reports. (Section 3 of Act 118 of 1923, as amended by Act 283 of 1929);

Section 13375 of Pope's Digest, Volume 2, Page 3300, fixing the tax on timber at seven cents per thousand feet. (Section 5 of Act 118 of 1923, as amended by Act 116 of 1933);

Section 13376 of Pope's Digest, Volume 2, Page 3301, giving the state a lien upon the natural resources severed for the tax and penalties and a lien on the machinery and tools of the "producer" (severer) that were used in severing such resources. (Section 6, Act 118 of 1923, as amended by Act 283 of 1929);

Section 13382 of Pope's Digest, Volume 2, pages 3301-3302, making the "producer" actually engaged in severing the natural resources responsible for the tax, and requiring him to make the reports and also requiring him to "collect or withhold out of the proceeds of the sale of the article severed the proportionate part of the total tax due by the respective owners of the natural resources at the time of severance;" also providing that any person failing or refusing to comply with the provisions of this section shall be guilty of a misdemeanor and punished by a fine. (Section 8, Act 118 of 1923, as amended by Act 283 of 1929).

C

The Date of the Judgment Sought to Be Reviewed and Date upon Which the Application for Appeal Is Presented.

The date of the decree sought to be reviewed herein is April 2, 1945. Petition for re-hearing was filed in the Supreme Court of Arkansas in apt time and said petition was denied on May 14, 1945. The date on which the application for appeal is presented is July 6, 1945.

D

Statement Showing That the Nature of the Case and of the Rulings of the Court Were Such As to Bring the Case Within the Jurisdictional Provisions Relied Upon.

This suit was begun in the Chancery Court of Garland County, Arkansas. The state, without securing any judgment, had filed its certificate in the office of the clerk of the Circuit Court of Garland County, claiming that the appellees, (appellants in the Supreme Court of the United States), who were engaged in business as manufacturers of lumber, owed $551.15 as severance taxes and penalties, covering a period of about five years on account of timber that had been severed from the United States National Forests. An execution was issued on this certificate under the provisions of section 13386, subdivision "I" of Pope's Digest, Volume 2, Page 3304.

Appellees filed suit in the Chancery Court to enjoin the sheriff from levying on their property. Appellees expressly stated in their original complaint that the severance tax statute was repugnant to the second clause of Article 6 (supremacy clause), and clause 2, section 3, article 4 of the Constitution of the United States. The state intervened in this suit.

The Chancery Court held that the statute violated the Constitution of the United States and enjoined the sheriff and cancelled the certificate and claim that had been filed by the state. The state appealed to the Supreme Court of Arkansas. The Supreme Court of Arkansas held that the state did not have territorial jurisdiction to levy the tax for the privilege of cutting the timber on lands held by the United States as original owner, but that it did have jurisdiction to levy such a tax for the privilege of cutting timber from lands which had been purchased with consent of

the state to be incorporated into the national forests. The Supreme Court of Arkansas found that appellees (appellants herein) were liable to the State of Arkansas for the severance tax on all timber which had been severed from land in the National Forest, which had been acquired by the Government under the order of Congress of March 1, 1911, and entered judgment against appellees (appellants herein) in the sum of Two Hundred, Seventy-six Dollars and Thirty-five Cents ($276.35).

E

Statement of Grounds upon Which it is Contended that the Questions Involved are Substantial

The questions that will be presented on this appeal are:

1. Whether the Arkansas Severance Tax Statutes constitute a direct interference with the United States in the disposal of its property;

2. Whether the statute interferes with the United States in harvesting its mature crop of timber and in clearing the mature, dead, and diseased timber out of the forests "for the purpose of preserving the living and growing timber and promoting the younger growth." (U. S. C. A., Volume 16, Section 476.)

The Facts

Appellees, from time to time since January 1, 1937, have severed timber from the national forests under contract with the United States that required them to remove all dead and diseased timber and all commercial timber marked for cutting within the specified areas. None of these agreements were completed sales. In each of them, the United States retained title to the timber until the trees had been felled, paid for, scaled, measured, or counted.

The main purpose was to get the mature, dead, and diseased trees out of the way "for the purpose of promoting the younger growth" in order to carry on the conservation program for which the national fo. sts were created. Therefore, the agreements required the work to be done without any unnecessary delays.

Appellees contend:

FIRST: The act, by its express terms, requires the severer to collect the tax from the owner of the product at the time of severance, or withhold it from the proceeds of the sale of the product. The United States having been the owner at the time of severance, the tax is a direct tax on the United States.

SECOND: Even if the title had not been retained by the United States, the cutting and removal of the timber was the main consideration for the contract. The act makes the tax apply specifically to the privilege of severing the timber on each unit of production. It is, therefore, a tax on the government's contract, and the requirement for securing a permit from the state, making reports to the state and paying tax for the privilege of severing constitutes a direct interference with the functions of the government.

A decision upon the questions involved will affect all of the transactions by which the United States disposes of the resources of the national forests and all of its contracts with respect to the management of the forests. Appellees, therefore, contend that the questions involved are substantial.

F

A copy of the opinion of the Supreme Court of Arkansas which was delivered upon the rendering of the decree sought to be reviewed is hereto attached.

G

Cases Believed to Sustain Jurisdiction

It is believed that the cases which sustain jurisdiction are those relating to taxes imposed upon the government's contracts or upon the privilege of doing the things that the government's contract required the other contracting party to do:

Pollack v. *Farmers Loan & Trust Co.*, 157 U. S. 429;
C. O. & G. Ry. Co. v. *Harrison*, 235 U. S. 292;
Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522;
Howard v. *Gipsy Oil Co.*, 247 U. S. 503;
Lorge Oil Co. v. *Howard*, 248 U. S. 549;
Federal Land Bank v. *Crossland*, 261 U. S. 374;
Oklahoma v. *Barnsdall Refineries*, 296 U. S. 521;
Weston v. *Charleston*, 2 Pet. 449;
Osborne v. *Bank of U. S.*, 9 Wheat. 738;
McCulloch v. *Maryland*, 4 Wheat. 316;

or those in which there was a direct interference with the functions of government:

Mayo v. *U. S.*, 319 U. S. 441;
Johnson v. *State of Maryland*, 254 U. S. 51.

Respectfully submitted,

WM. J. KIBBY,
SCOTT WOOD,
Attorneys for Appellees.

IN THE SUPREME COURT OF ARKANSAS

No. 7527

OTHO COOK, Commissioner of Revenues,
Appellant,

v.

WARREN W. WILSON, ET AL.,
Appellees.

Opinion Delivered April 2, 1945

Appeal from Garland Chancery Court

Affirmed in part; Reversed and rendered in part

The Chief Justice dissents as to the severance:

MCFADDIN, *J.:*

The question presented is whether the State may collect from the purchaser and severer the severance tax on timber cut from lands belonging to the United States in a national forest.

Appellees are partners trading under the firm name of Wilson Lumber Company; and at various times they have severed timber in the United States national forest under "Timber Sale Agreement" with the United States Department of Agriculture. One such agreement was introduced; it is quite lengthy, but the salient provisions are: (1) The "purchaser" (appellees) agreed to purchase from a certain area in the national forest "all of the dead timber standing or down and all of the live timber marked or designated for cutting by a forest officer, merchantable as hereinafter defined for saw logs." (2) Merchantable live timber was to be marked for cutting by paint spots. (3) The purchaser agreed to deposit certain sums of money with the United States depository, to be credited against the purchase of the timber in the agreement; and the purchase price was $10.35 per thousand feet board measure. (4) After the timber was cut, the logs were to be arranged

for scaling as often as a minimum of 350 logs was available; and when scaled, and the price of the particular lot determined, then the price of that lot was to be charged against the deposit made by the purchaser to the depository as previously mentioned. (5) The agreement recited that "the title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted." And, furthermore, that "no timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured or counted by a forest officer." (6) In addition to cutting, removing, and paying for the merchantable timber, the purchaser was also, under supervision of the forest officer, to cut and remove all dead or diseased timber, and dispose of it, from the acreage involved in the contract; and the purchaser was to participate, by payments and or man power, in fighting forest fires. The logging camp and details of operation were prescribed in the contract. The purchaser, furthermore, made a fidelity bond for the faithful performance of the contract.

The Commissioner of Revenues filed his certificate in Garland County (Sec. 13384, Pope's Digest) claiming that the appellees owed the State of Arkansas the severance tax (and penalty) on the timber cut and removed by the appellees from the national forest under the said Timber Sale Agreement. The appellees filed suit in the Garland Chancery Court to enjoin the Sheriff from serving execution issued on the certificate, and appellees claimed immunity from the tax because the timber came from lands of the national forest. The State Commissioner of Revenues intervened as a defendant in the suit, and sought to sustain the tax. The chancery court denied the claim of the State to collect the severance tax, and this appeal challenges that decree and presents the points herein discussed.

I. *Was the Arkansas Severance Tax Law Intended to Apply to Persons Severing Timber from Lands of the United States in a National Forest?* We answer this question in the affirmative. The original severance tax act was Act 118 of 1923. It has been frequently amended, and some of the amendatory acts are: Act 283 of 1929, Acts 116 and

138 of 1933, and Act 158 of 1937. The Act, with amendments, may be found in Section 13371 *et seq.* of Pope's Digest. Briefly, the Act: (1) levies a tax on the business of severing timber (Section 13371); (2) requires the severer or "producer" to obtain a permit from the State, and make regular reports (Section 13372); (3) provides that the tax shall remain a lien on each unit of production, and the tools and equipment used in the severing (Sections 13372 and 13376); (4) requires the reporting taxpayer to withhold the tax from the proceeds of the severed products (Section 13382); (5) provides that the severed resources shall not be removed until the tax is paid (Section 13386).

The Act contains only two exemptions, to wit: (1) Section 13374 provides that the Act shall not apply to any individual owner of timber "who occasionally severs or cuts from his own premises such stocks, logs, poles, or other forest products, as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use, and not for sale, commercial gain, or profit." (2) Section 13375 provides an exemption "that no tax herein levied shall apply to the producer of switch ties, who hews out or makes such switch ties entirely by hand."

These are the only two exemptions found in the Severance Tax Law. The listing of these two exemptions necessarily excludes all other exemptions under the well-known rule of *expressio unius est exclusio alterius.* St. L., I. M. & S. Ry. v. Branch, 45 Ark. 524; Chisholm v. Crye, 83 Ark. 495, 104 S. W. 167; 25 C. J. 220; 59 C. J. 984, 50 Am. Jvris. 455. We reach the conclusion that the Act levies a uniform tax on the business of severing timber in all instances except the two exemptions mentioned, and therefore it was the intent of the Legislature to apply the law to all other cases; and the tax would apply to the case at bar, as the transaction here involved does not come within either exemption.

II. *Does the Immunity of a Federal Government Instrumentality Inure to the Benefit of the Appellees?* It is fundamental that the Federal Government and its instrumen-

talities are exempt from state taxation. McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Wheat. 738; Thompson v. U. P. R. R., 9 Wall (U. S.) 579; Weston v. Charleston, 2 Pet. 449; Pollock v. Farmers Loan and Trust Co., 157 U. S. 429. On the other hand, the tax immunity does not inure to a person, firm, or corporation merely because such claimant has a contract with, or a grant from, the Federal Government. Graves v. New York, 306 U. S. 466, 83 L. Ed. 927; James v. Dravo Construction Co., 302 U. S. 134, 82 L. Ed. 155; Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186, 82 L. Ed. 187; Alabama v. King, 314 U. S. 1, 86 L. Ed. 3; Penn. Dairies v. Milk Control Commission, 318 U. S. 261, 87 L. Ed. 748; Fox Film Co. v. Doyal, 286 U. S. 123, 76 L. Ed. 1010.

Prior to James v. Dravo, supra, decided December 6, 1937, a tax like the one at bar might not have been sustained, because in Graves v. Texas Co., 298 U. S. 393, 80 L. Ed. 1236, and other cases, any effort to levy a tax that would ultimately fall on the Federal Government had been defeated. As was said by Mr. Justice Roberts in his dissenting opinion in James v. Dravo, supra, that case marked a radical departure from previous decisions. So we start with James v. Dravo, supra, and the companion case of Mason v. Washington, 302 U. S. 186, 82 L. Ed. 187, decided on the same day, as the beginning of the present rule of taxation in a case like the one at bar; and this rule is emphasized by Alabama v. King, supra, decided November 10, 1941.

In James v. Dravo, supra, the Supreme Court of the United States upheld the Gross Sales and Income Tax Law of West Virginia, which levied an annual privilege tax "on account of business and other activities." The tax was on the business of contracting, and was 2% of the gross income. The Dravo Construction Company was a Pennsylvania corporation domesticated in West Virginia, and engaged in four contracts with the United States for the construction of locks and dams on the Ohio and Kanawha Rivers. The Supreme Court of the United States said that there were two questions: (1) whether the State had territorial jurisdiction to impose the tax, and (2) whether

the tax was invalid as laying a burden on the operations of the Federal Government.

(1) As to territorial jurisdiction, the Court held that the State of West Virginia still had the right of taxation on activities located on the lands acquired by the United States by purchase or condemnation for the purpose of the improvement, reasoning: that even though the State of West Virginia had agreed to the U. S. Government's acquisition of title to the land, nevertheless, the State of West Virginia still retained its residuum of legislative jurisdiction; and that the United States held lands within the State for public purposes, but that ownership did not withdraw the lands from the jurisdiction of the State. Emphasis was placed on the terms of cession. It was pointed out that the State, in reserving the right to issue process, did not lose the right to tax an independent contractor; and that the Dravo Construction Company was an independent contractor, and could be taxed with respect to its activities carried on on the lands owned by the United States.

(2) As to whether the tax was invalid, as a burden on the Federal Government, the Court held that the Dravo Construction Company was an independent contractor, that the tax was not laid on the contract of the United States, but was laid on the business of the Dravo Construction Company, and that the West Virginia tax, so far as it was laid upon the gross receipts of the Dravo Construction Company, did not interfere in any substantial way with the performance of the Federal Government, and was a valid exaction.

In Mason v. Washington, supra, the tax was practically the same: a tax on a contractor engaged in building the Grand Coulee dam on the Columbia River. The tax was called an occupation tax. In that case the United States Government had acquired title to approximately 840 acres, and all of the work of the Mason Company was on that land. But the Court held that when the United States acquired title to the land, it did not deprive the State of its residuum of legislative authority. The Court used these words:

> "The question * * * is whether the United States has acquired exclusive legislative authority so

as to debar the State from exercising any legislative authority including its taxing and police power in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise."

The Court held that when the United States acquired the lands, the State of Washington did not lose the residuum of jurisdiction.

We proceed now to test the case at bar against: (A) territorial jurisdiction, and (B) burden on government operations, as outlined in the two cases from the United States Supreme Court just mentioned.

(A) *Territorial Jurisdiction.* The federal legislation covering national forests is found in U. S. C. A. Title 16, Section 471, *et seq.* The federal statutes show that national forests are established in two ways: (a) by presidential proclamation declaring certain lands of the public domain to be a national forest. This is under Section 471 and only includes lands that had never passed from the United States. (See Light v. U. S., 220 U. S. 523, 55 L. Ed. 570). (b) The purchase or acquisition of other lands under Section 516. These lands are acquired by the Federal Government only after the Legislature of the State has consented to such acquisition. This Section 516 is the Act of Congress of March 1, 1911.

Regarding timber severed from lands incorporated into the national forest by presidential proclamation under Section 471, 34 hold that the State has no right to collect the severance tax because the State never had the "residuum of jurisdiction," as that language is used in the cases of James v. Dravo and Mason v. Washington, supra. Appellant claims that U. S. C. A. Title 16, Section 480 gives the State the right to impose the tax in such a case. We con-

strue that Section as allowing civil and criminal jurisdiction, but not allowing taxation.

Regarding timber severed from lands incorporated into the national forest by *acquisition* under Section 516, we hold that the State has the right to collect the severance tax, so far as territorial jurisdiction is concerned, because the State has the "residuum of jurisdiction." The Arkansas Legislature, by Act No. 148 of 1917, and by Act No. 108 of 1927 (see Sections 5656-7, Pope's Digest), gave the consent of the State of Arkansas to the acquisition by the United States of lands for the establishment, consolidation, and extension of national forests as provided by the Act of Congress of March 1, 1911, "provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed." A comparison of Sections 5656-7 of Pope's Digest with the West Virginia statutes shown in the case of James v. Dravo, supra, leads to the inevitable conclusion that the State of Arkansas still retains its residuum of jurisdiction over lands that became a part of the national forest under U. S. C. A. Title 16, Section 516.

Appellees, in their claim for tax immunity, cite C. O. & G. Ry. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, and Oklahoma v. Barnsdall, 296 U. S. 521, 80 L. Ed. 366. Each of these cases involved a severance tax levied by the State of Oklahoma on minerals from Indian lands, and in each case the tax was not permitted. We distinguish these cases in two ways, (1) these cases were decided prior to James v. Dravo, and (2) in these cases, the minerals were held by the United States government as a trustee for Indian tribes. The State of Oklahoma had never ceded the lands to the United States government, and therefore has no "residuum of Legislative authority." The original title was in the United States as trustee for the Indians, and that original title in the United States prevented the State from

exercising any tax rights without the permission of the United States.

(B) *Burden on Governmental Operations.* In their claim that no tax is due the State, appellees contend that cutting the timber was a federal matter, and the appellees operated as a federal instrumentality, and to impose a tax upon the appellees would be an indirect tax on a federal operation or instrumentality. We hold that the appellees, in cutting and removing the timber, acted as independent purchasers, and not as a government instrumentality, and that this is not a tax on governmental operations. In James v. Dravo, supra, and in Mason v. Washington, supra, the construction company was in each instance an independent contractor, and the tax was permitted. In Alabama v. King, supra, the contractor was buying supplies on a "cost plus" contract, and a state sales tax was held to be collectible. In each case the claim for tax immunity was the same as the claim made by the appellees in the case at bar. Here the appellees were outright purchasers and severers, and therefore far more distinctly independent than were the contractors taxed in the cases just mentioned.

The Arkansas severance tax is a privilege tax or license tax; and is levied on the business of severing. Section 13371, Pope's Digest; Floyd v. Miller Lumber Co., 160 Ark. 17, 254 S. W. 450; same case on second trial, 169 Ark. 473, 275 S. W. 741; McLeod, Commissioner v. K. C. S. R., 206 Ark. 281, 175 S. W. (2d) 391. The Arkansas severance tax is in no sense an ad valorem tax, so the case of U. S. v. Alleghany County, 322 U. S. 186, 88 L. Ed. (adv. opn.) 845 has no application. The Arkansas severance tax is non discriminatory, as has been previously shown. It taxes, alike, all who sever timber for commercial gain, just as the appellees do here, since they are engaged in the lumber business. In the case of Buckstaff Co. v. McKinley, 198 Ark. 91, 123 S. W. (2d) 802, there was an effort to avoid a state tax, on the plea of governmental agency, and we said:

> "Imposition of the tax here does not, in any sense, interfere with the government's business."

The United States Supreme Court, in affirming the case (308 U. S. 358, 84 L. Ed. 322) said:

> "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter."

In James v. Dravo, supra, the Court quoted from F. & D. Co. v. Pennsylvania, 240 U. S. 318, 60 L. Ed. 664:

> "Mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."

See also Collins v. Yosemite, 304 U. S. 518, 82 L. Ed. 1502. So we hold that the appellees are not entitled to claim any tax immunity as a governmental instrumentality, or because of governmental operations, and are liable for severance tax on all timber cut from land that became a part of the national forest by governmental acquisition under U. S. C. A. Title 16, Section 516.

III. *Was There any Ruling by the State Revenue Commissioner that Now Prevents the State from Enforcing the State Severance Tax?* Finally, appellees argue that the State should not now be allowed to collect the severance tax on timber cut from any lands in a national forest, because from 1923 to 1939 the State made no effort to collect any such tax from these appellees. No ruling of the Commissioner of Revenues is pleaded or proved, but it is argued that the failure of the State to make earlier demands now operates as a bar against the present demand. Executive construction of a statute is entitled to consideration by the courts, and should not be disregarded except for cogent reasons, or unless clearly erroneous. 59 C. J. 1027; 25 R. C. L. 1045; 42 Am. Juris., 392 et seq.; Moses v. McLeod, 207 Ark. ——, 180 S. W. (2d) 110. But there are several reasons why appellees cannot sustain their contention about an executive construction:

In the first place, no affirmative ruling of the Commissioner of Revenues was pleaded or proved. The most that the appellees claimed was that *they* had not paid the tax

from 1923 to 1937. Whether other persons similarly situated had paid the tax was not shown. The failure of the Commissioner of Revenues to pursue appellees earlier cannot be used as a defense when suit is undertaken within the period of limitations. Secondly, if there had been an administrative ruling, it would yield to a judicial construction, when the ruling was shown to be erroneous. As stated in Am. Juris. 398:

> "A construction of doubtful correctness may be sustained, but one manifestly wrong or clearly erroneous cannot be upheld."

Thirdly, from the passage of the Severance Tax Law in 1923 until the decision by the United States Supreme Court in James v. Dravo, supra, in 1937, the State Commissioner of Revenues might have thought that liability would not be sustained because of decisions of the United States Supreme Court in cases like Green v. Texas Co., 298 U. S. 393, 80 L. Ed. 1236, and such earlier cases as Dobbins v. Erie County, 16 Peters 435, 10 L. Ed. 1022; Collector v. Day, 11 Wallace 118, 20 L. Ed. 122. The tax had all the time been levied by legislative action, but remained uncollected. The innovation of the decision of James v. Dravo, supra, is pointed out by Mr. Justice Roberts in his dissenting opinion. The State of Arkansas should not now be deprived of its tax because the Commissioner of Revenues failed for a number of years to collect the tax, not anticipating the decision of the United States Supreme Court in James v. Dravo, supra. Finally no administrative ruling of the Commissioner of Revenues of the State of Arkansas (and none has been shown) has worked prejudice to the appellees in the case at bar, because the tax here involved originated by reasons of transactions in 1940, and any delay from 1923 to 1937 has not prejudiced the appellees regarding a 1940 tax liability.

To Summarize and Conclude, we hold:

1. That the appellees are not liable to the State for severance tax on timber severed by them from lands held by the United States as original owner (U. S. C. A. Title

16, Section 471); and to that extent the decree of the chancery court is affirmed;

2. That the appellees are liable to the State of Arkansas for severance tax and penalty on all timber severed by them from lands acquired by the United States under the Act of Congress of March 1, 1911 (U. S. C. A. Title 16, Section 516). The stipulation in the record in this case shows that such severance tax and penalty is $276.35; and the decree of the chancery court as to this, is reversed, and decree is rendered here for the State of Arkansas and against the appellees for said amount of $276.35 with interest from this date until paid. Costs adjudged against appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 329

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS,

Appellant,

vs.

WARREN W. WILSON, ET AL.

STATEMENT AS TO JURISDICTION UNDER RULE 12

This appeal is taken from an opinion rendered by the Arkansas Supreme Court, which is the Tribunal of last resort in the State of Arkansas. The case was originally filed in the Garland Chancery Court of Arkansas, with Warren W. Wilson, et al., as Plaintiffs and Murray B. McLeod, Commissioner of Revenues for Arkansas, as Defendant. The case was appealed from the Chancery Court to the Arkansas Supreme Court by the Commissioner. Later Otho A. Cook, the successor of Murray B. McLeod, was designated appellant by permission of the Supreme Court. The opinion from which this appeal lies was rendered April 2, 1945, and appears in the Arkansas Law Reporter, Vol. 83, No. 1, Page 938.

The Arkansas Supreme Court in rendering its opinion grounded that part in which the cross appeal is taken upon an issue not raised by either of the parties to the law suit.

The question involved in the State Court was whether the Commissioner of Revenues had the authority to collect a Severance Tax from Warren W. Wilson, et al., upon timber which was severed on lands which lie in the National Forests.

The Court held as follows: (L. Rep. Vol. 83, No. 1, Page 945)

> "(A) *Territorial Jurisdiction.* The federal legislation covering national forests is found in U. S. C. A. Title 16, Par. 471, *et seq.* The federal statutes show that national forests are established in two ways: (a) by presidential proclamation declaring certain lands of the public domain to be a national forest. This is under Par. 471, and only includes lands that had never passed from the United States. (See *Light* v. *U. S.*, 523, 55 L. Ed. 570). (b) The purchase or acquisition of other lands under Par. 516. These lands are acquired by the Federal Government only after the Legislature of the State has consented to such acquisition. This Par. 516 is the Act of Congress of March 1, 1911.
>
> Regarding timber severed from lands incorporated into the national forest by presidential proclamation under Par. 47134, we hold that the State has no right to collect the severance tax because the State never had the "residuum of jurisdiction," as that language is used in the cases of *James* v. *Dravo* and *Mason* v. *Washington, supra.* Appellant claims that U. S. C. A. Title 16, Par. 480, gives the State the right to impose the tax in such a case. We construe that section as allowing civil and criminal jurisdiction, but not allowing taxation.
>
> Regarding timber severed from lands incorporated into the national forest by *acquisition* under Par. 516, we hold that the State has the right to collect the severance tax, so far as territorial jurisdiction is con-

cerned, because the State has the "residuum of jurisdiction." The Arkansas Legislature, by Act No. 148 of 1917, and by Act No. 108 of 1927 (See Pars. 5646-7, Pope's Digest), gave the consent of the State of Arkansas to the acquisition by the United States of lands for the establishment, consolidation and extension of national forests as provided by the Act of Congress of March 1, 1911, "provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed." A comparison of Pars. 5646-7 of Pope's Digest with the West Virginia statutes shown in the case of *James* v. *Dravo*; *supra*, leads to the inevitable conclusion that the State of Arkansas still retains its residuum of jurisdiction over lands that became a part of the national forest under U. S. C. A. Title 16, Par. 516.

Appellees, in their claim for tax immunity, cite *C. O. & G. Ry.* v. *Harrison*, 235 U. S. 292, 59 L. Ed. 234, and *Oklahoma* v. *Barnsdall*, 296 U. S. 521, 80 L. Ed. 366. Each of these cases involved a severance tax levied by the State of Oklahoma on minerals from Indian lands, and in each case the tax was not permitted. We distinguish these cases in two ways: (1) these cases were decided prior to *James* v. *Dravo*, and (2) in these cases, the minerals were held by the United States Government as a trustee for Indian tribes. The State of Oklahoma had never ceded the lands to the United States Government, and therefore has no "residuum of legislative authority." The original title was in the United States as trustee for the Indians, and that original title in the United States prevented the State from exercising any tax rights without the permission of the United States."

"1. That the appellees are not liable to the State for severance tax on timber severed by them from lands

held by the United States as original owner (U. S. C. A. Title 16, Par. 471); and to that extent the decree of the chancery court is affirmed; * * *" (L. Rep. Vol. 83, No. 1, Page 949).

It is believed by the cross appellant that the Court erred in holding that the State Severance Tax could not be collected from timber severed from the National Forests, with reference to that portion of the forests so proclaimed under U. S. C. A. Title 16, Par. 471. The State has at all times during this case asserted that it has the right to collect the Severance Tax on timber severed from all portions of the National Forests. Since the Supreme Court of Arkansas has interpreted the Federal Statutes adversely to the contention of the State, it is believed by the cross appellant that a substantial federal question is raised and for a determination of which an appeal has been taken to the Supreme Court of the United States.

The cross appellant believes the following cases support its appeal with reference to the jurisdiction of this Court: *Miedreich* v. *Lauenstein*, 232 U. S. 236, 242, 58 L. Ed. 584, 589, 34 Sup. Ct. Rep. 309; *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 257, 58 L. Ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cases 1914C, 159, 9 N. C. C. A. 109; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188, 60 L. Ed. 594, 597, 36 Sup. Ct. Rep. 265; *State of California* v. *Deseret Water, Oil & Irrigation Company*, 243 U. S. 415, 64 L. Ed. 821.

The Federal Statutes involved herewith and pertinent to the issue are as follows:

"Para. 471. National forests; establishment; limitation on additions in certain States; lands suitable for production of timber.

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the

public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

(a) No national forest shall be created, nor shall any additions be made to one created prior to June 25, 1910, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

(b) The President, in his discretion, is authorized to establish as national forests or parts thereof, any lands within the boundaries of Government reservations, other than national parks, reservations for phosphate and other mineral deposits, or water-power purposes, national monuments and Indian reservations, which in the opinion of the Secretary of the department now administering the area and the Secretary of Agriculture are suitable for the production of timber, to be administered by the Secretary of Agriculture under such rules and regulations and in accordance with such general plans as may be jointly approved by the Secretary of Agriculture and the Secretary formerly administering the area, for the use and occupation of such lands and for the sale of products therefrom. Any person who shall violate any rule or regulation promulgated under this subdivision shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisoned for not more than one year, or both. March 3, 1891, c. 561, Par. 24, 26 Stat. 1103; March 4, 1907, c. 2907, 34 Stat. 1271; June 25, 1910, c. 421, Par. 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497; June 7, 1924 c. 348, Par. 9, 43 Stat. 655." (U. S. C. A. Title 16, Par. 471).

"Para. 480. Civil and criminal jurisdiction.

The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States

therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. June 4, 1897, c. 2, Par. 1, 30 Stat. 36; March 1, 1911, c. 186, Par. 12, 36 Stat. 963." (U. S. C. A. Title 16, Par. 480).

"Para. 516. Purchase of lands approved by commission; consent of State; exchange of lands; cutting and removing timber.

The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the Legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. With the approval of the National Forest Reservation Commission as provided by this section and section 515 of this title, and when the public interests will be benefitted thereby, the Secretary of Agriculture is authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests acquired under said sections which, in his opinion, are chiefly valuable for the purposes as therein stated, and in exchange therefor to convey by deed not to exceed an equal value of such national forest land in the same State, or he may authorize the grantor to cut and remove an equal value of timber within such national forests in the same State, the values in each case to be determined by him. Before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be

published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in such exchange. Timber given in such exchanges shall be cut and removed under the laws and regulations relating to such national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands so accepted by the Secretary of Agriculture shall, upon acceptance, become parts of the national forests within whose exterior boundaries they are located, and be subject to all the provisions of sections 480, 500, 513 519 and 521 of this title. March 1, 1911, c. 186, Par. 7, 36 Stat. 962; March 3, 1925, c. 473, 43 Stat. 1215." (U. S. C. A. Title 16, Par. 516).

The State Statutes involved herewith and pertinent to the issue are as follows:

"Pope's Digest, Par. 13371. Tax levied. There is hereby levied a privilege or license tax, to be known as 'the Severance Tax,' for the year 1923 and for each subsequent year, upon each person, firm, corporation or association of persons, hereinafter called 'the producer,' engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine and all other forest products and all other natural products of the soil or water of Arkansas. Section 1, Act 118 of 1923."

"Pope's Digest, Par. 13372. Permit to sever resources. Any person, firm, corporation or association desiring to engage in the business of severing natural resources as contemplated by this Act, shall before en

tering upon such business, make application for license or permit therefor to the Commissioner of Revenues.

Such application shall, on forms to be prescribed by the Commissioner, state under oath the name of the applicant, the business in which applicant desires to engage, and the counties in which the operations are to be carried on, and the amount and value of the anticipated production of the ensuing month based on applicant's operation for the preceding month. In such form the applicant shall expressly agree to abide by the provisions of this Act and promptly to pay the severance tax hereby imposed upon its subsequent ascertainment based upon the Producer's Report as hereinafter required.

The applicant shall expressly obligate himself to pay at the end of the ensuing monthly period, as hereinafter prescribed, the amount of such estimated tax, more or less according to the actual production, and shall consent that such severance tax shall constitute and remain a lien on each unit of production until paid into the State Treasury as hereinafter provided.

Upon the filing of such application, the Commissioner shall estimate the amount of the tax which shall accrue as based upon said anticipated production and shall issue a permit, wherein shall be stipulated such estimated amount.

Whoever shall engage in the business of severing natural resources, without having made application for and secured a license or permit, as contemplated by this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five ($25.00) dollars nor more than One Hundred ($100.00) Dollars. Ib. Par. 2, as amended by Act 283 of 1929, Sec. 1, March 29, 1929."

"Pope's Digest, Par. 13373. Producers to report to Commissioner of Revenues. Every producer shall, within ten days after the end of each month, file with the Commissioner of Revenues a verified report of the business conducted by such producer during the past preceding month.

Said Producer's Report shall be made upon forms prescribed by the Commissioner of Revenues, and shall truly set forth the kind of natural resources and place where severed or produced, the gross quantity and actual cash value thereof, and such other reasonable and necessary information as the Commissioner may require for the proper enforcement of the provisions of this Act.

The report required by this Section shall be signed and sworn to by the individual producer or by a member of the producing firm, if a partnership, or by the president, secretary or managing producer, if a corporation. A willful false swearing as to the contents of said report shall constitute the crime of perjury and shall be punished as such.

The report herein prescribed shall be prepared and executed in triplicate, one copy of which shall be by the producer filed with the County Clerk in the county wherein the producer is doing business. Said report so filed shall be preserved as a public record.

The failure of any person, firm, corporation or association to make the statements required by this Section shall be punished by fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) for each such offense. Ib. Par. 3 as amended by Act 283 of 1929, Sec. 2."

"Pope's Digest, Par. 13374. Privilege tax. Except as to the production of certain natural resources, the privilege tax upon which is hereinafter specially provided for, each producer at the time of rendering such monthly report, shall concurrently file a duplicate thereof with and pay to the State Treasurer, through the Commission of Revenues, a privilege tax amounting to two and one-half (2½) per cent of the gross cash market value of the total production of such natural resources during the preceding monthly period.

The value of such products shall be computed as of the time when and at the place where the same have been severed or taken from the soil or water, and in their unmanufactured state immediately after such

severance. Provided, this Act shall not apply to nor shall any severance tax be required of the individual owner of timber who occasionally severs or cuts from his own premises such stocks, logs, poles or other forest products as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use and not for sale, commercial gain or profit.

Every person, firm, corporation or association severing any natural resources under the provisions of this Section, shall be liable to the State for the severance tax imposed herein, and in addition thereto the tract of land from which product was severed shall be subject to the lien hereinafter created. Ib. Par. 4, as amended by Act 283 of 1929, Sec. 3."

"Pope's Digest, Par. 13382. Who liable for tax. Except as otherwise in this Section provided, the making of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor.

The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

And in the case of oil and gas, such production as shall be sold or delivered to any pipe line company and transported by it through pipes connected with the oil or gas well of the owner shall notwithstanding such sale or delivery be liable for the tax herein levied.

Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any such royalty or other interest the

amount of the severance tax herein levied before making such payment:

Any person, firm, corporation or association failing or refusing to comply with any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00), for each offense. Ib. Par. 8, as amended by Act 283 of 1929. Sec. 6."

This cross appeal is taken pursuant to Section 237, Judicial Code, as amended; 28 U. S. Code Ann., Sec. 344(a)-861(a).

If the Court should hold that appeal is not the proper remedy, then pursuant to Section 237(c) of the Judicial Code, 28 U. S. Code Ann., Section 344(c), we ask that this be treated as an application for certiorari (*Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 651, 86 L. Ed. 1094).

THOS. S. BUZBEE,
HERRN NORTHCUTT,
Counsel for Appellant.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1945

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY ..... *Appellants*

v. No. 328

OTHO A. COOK, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANTS ON FINAL HEARING

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OCTOBER TERM, 1945

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY ..... *Appellants*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANTS ON FINAL HEARING

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Arkansas has not yet appeared in the official reports, but a copy of it is in the record (pp. 22-31). The opinion upheld the Arkansas severance tax statute, which laid a tax on the privilege of severing timber from the national forests while title to the timber remained in the United States.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The grounds on which the jurisdiction of this Court is invoked are:

1. The severance tax statute, as construed by the Supreme Court of Arkansas, constitutes a direct interference with the United States in the disposal of its property, and it is repugnant to paragraph 2 of section 3 of article 4 of the Constitution of the United States, which provides that Congress shall have the power to dispose of and make all needful regulations respecting the territory and other property belonging to the United States, and repugnant to article 6, clause 2 (supremacy clause) of the Constitution of the United States and the Acts of Congress which authorize sale of timber in the national forests.

2. The act, by its express terms, requires the severer to collect the tax from the owner of the product at the time of severance or to withhold it from the proceeds of sale of said product. The United States having been the owner of the said product at the time of severance, the tax is a direct tax on the United States.

3. The tax is a tax on the government's contract. The act requires the severer to secure a permit from the state, to make reports to the state, and to pay a tax for the privilege of severing the timber which he is required to sever under the terms of his contract with the United States, all of which constitutes a direct interference with the functions of the government.

STATEMENT OF THE CASE

This controversy began when the state of Arkansas, under the provisions of sections 13,384-13,386 of Pope's Digest, filed its certificate with the Circuit Clerk of Garland County, Arkansas, claiming that appellants owed the state a severance tax of $.07 per thousand feet for 6,298,854 feet of timber that had been severed by the appellants from the national forests, plus a penalty of 25% for failure to pay the tax.

Section 13,384 and section 13,386 provide that when the tax has become delinquent, the commissioner of revenues shall certify the amount of the tax, together with penalties, to the circuit clerk of the county where the same or any part thereof accrued, and it shall be the duty of the clerk to record the certificate upon the docket of the Circuit Court for judgments and decrees as provided by sections 8440 and 8442 of Pope's Digest. Subdivision I of said section 13,386 provides that "any aggrieved purchaser may appeal to the Chancery Court for an injunction against the tax".

Appellants' complaint stated that the Commissioner of Revenues of the State of Arkansas had filed his certificate showing that appellants owed the state of Arkansas at the rate of seven cents per thousand feet for 6,298,854 feet of timber severed from the soil, plus a penalty of 25%, amounting to a total of $551.15; that the Clerk of the Circuit Court had issued execution on the certificate and the sheriff was about to levy on appellants' property; that the state's claim was for timber which appellants had severed from the national forests under contracts with the United States, which contracts were executed by

the appellants and the United States under authority granted by acts of Congress authorizing sale of timber in the national forests; that the action of the state of Arkansas was in violation of the act of Congress above referred to and in violation of the second paragraph of section 3, article 4 and article 6, clause 2 of the Constitution of the United States.

The complaint prayed that the execution on the said certificate be cancelled; that the certificate be cancelled and that the sheriff be enjoined from levying the said execution on appellant's property (R. 3-5).

THE AGREEMENT BETWEEN THE UNITED STATES AND APPELLANTS

It was stipulated by counsel for the parties that the state's claim was based on "the fact that appellants had severed timber from the United States national forests under several contracts entered into by plaintiffs and the United States Department of Agriculture". It was agreed that all of said contracts were substantially the same, and one of them was introduced as evidence applying to all of them (R. 6, 7-20).

This agreement was called, "Timber Sale Agreement". Appellants are called "The Purchasers". They agree to purchase from the area designated (about 2300 acres in this sample agreement) within the Ouachita National Forest all the dead timber standing or down and all of the live timber marked or designated for cutting by a Forest Officer merchantable as hereinafter defined for saw logs" (R. 8).

The agreement gives the price per thousand feet which was paid and states:

> "Payment shall be made in advance installments of not less than one thousand dollars and not more than five thousand dollars each, as determined by the Forest Officer in charge and when called for by him.
> • • • •
> "Scaling.—7. Material shall be piled or skidded for scaling, measurement, or count if required by the Forest Officer in charge and in such manner as he shall direct. *The title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted.* • • • (Emphasis added).
> "12. The purchaser shall cut all and only marked or designated live trees and shall remove all merchantable logs from the sale area. No timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured, or counted by a Forest Officer."

Paragraph 14 of the agreement requires the purchaser to pay double the current price for all undesignated timber damaged by carelessness of the purchaser, his employees, or contractors or employees of contractors and also to pay at double the current price for all such trees that may be injured by fires caused by the carelessness of the purchaser or his employees, or contractors, or by fires, the origin or spread of which he or they could have prevented. This section also provides that

> "Unless extension of time is granted by the Forest Supervisor the right, title and interest to any

timber for which payment has been made under the provisions of this section shall revert to the United States without compensation unless it shall have been removed from any portion of the sale *area accepted* by the Forest Officer in charge within the three months next succeeding the date of such acceptance, or from the remainder of the sale area during the same number of months next succeeding the date of expiration or termination of this agreement. * * *

"*In order to check the spread of tree disease and to improve the condition of the stand, the purchaser shall cut all dead and diseased trees marked or designated for cutting on the sale area whether merchantable or apparently unmerchantable.* * * * (Emphasis added).

"All operations on the sale area, including the removal of scaled timber, may be suspended by the Forest Officer in charge, in writing, if the conditions and requirements contained in this agreement are disregarded, and failure to comply with any one of said conditions and requirements, if persisted in, shall be sufficient cause for the termination of this agreement. * * *

"And as a further guarantee of a faithful performance of the conditions of this agreement, the purchaser delivers herewith a bond in the sum of twenty-five hundred dollars ($2,500.00), and further agrees that all moneys paid under this agreement shall upon failure on his part to fulfill all and singular the conditions and requirements herein set forth, or made a part hereof, may be retained by the United States to be applied as far as may be to the satisfaction of his obligations assumed hereunder."

DECREE OF CHANCERY COURT

The Chancery Court held "that the Arkansas severance tax, if it be applied to timber severed from the national forest pursuant to agreements such as those introduced in evidence in this cause between the United States and the persons severing said timber, would be a tax on the operations of the government of the United States and a tax on the right of the United States to harvest the mature timber on its national forest; and the severance tax does not apply to the timber severed by the plaintiffs from the national forest".

The Chancery Court held that the certificate which had been filed by the Commissioner of Revenues was void and cancelled the certificate and the execution which had been issued on it (R. 21-22).

JUDGMENT OF SUPREME COURT OF ARKANSAS

The Commissioner of Revenues appealed to the Supreme Court of Arkansas, which held that the statute as applied to the timber severed from the national forests was not invalid as a burden on the United States and that it did not interfere with the government's business (R.22-29); that the state did not have territorial jurisdiction to lay the tax on that part of the national forests where the title to the land was held by the United States as original owner; but that the state did have territorial jurisdiction to lay the tax on that part of the national forests where the title to the land had been acquired by the United States by purchase under the act of Congress of March, 1911 (USCA Title 16, Sec. 516). The Supreme Court of Arkansas reversed the decree of the Chancery Court and entered

a decree in favor of the state of Arkansas in the sum of $276.35 for the timber which had been severed on that part of the national forests which had been acquired by purchase under the act of Congress (R. 31). (Appellants did not in the Supreme Court of Arkansas or in the Chancery Court argue that the state lacked territorial jurisdiction in any part of the area that was involved in the controversy.)

ASSIGNMENT OF ERRORS

1. The Supreme Court of Arkansas erred in giving judgment reversing the judgment of the Chancery Court of Garland County, Arkansas, which held to be void the severance tax statute of the state of Arkansas, which laid a tax for the privilege *of severing timber from the United States National Forests, while title to the said timber was in the Unied States*, which act also required the persons having contracts with the United States for severing the said timber to secure from the state of Arkansas a permit or license before beginning the execution of their said contracts with the United States.

2. The Supreme Court of Arkansas erred in holding that the said severance tax law was not repugnant to the second clause of article 6 (supremacy clause) of the Constitution of the United States, which provides that Congress shall have power to dispose of and make all needful rules regulating the territory and other property belonging to the United States.

DESIGNATION OF POINTS UNDER RULE 13

Appellants' designation under rule 13 of points to be relied on sets out the points with more particularity:

"Appellants insist that this statute, as applied to the severing of the timber by appellants in the national forests, is repugnant to the second clause of article 6 of the Constitution of the United States (supremacy clause), and is also repugnant to clause 2, section 3, article 4 of the Constitution, which provides that Congress shall have power to dispose of and make all needful rules regulating the territory and other property belonging to the United States. Appellants insist that the statute is unconstitutional and void for the following reasons:

"A. The tax is a tax on the contract of the United States with appellants, which required appellants to sever the timber.

"B. Under the contract between appellants and the United States, appellants were instrumentalities of the United States and immune from the tax.

"C. The statute requires the appellants to pay the tax and collect it from the owner of the land at the time of severance, and subjects appellants to prosecution and fine for failure to do so; and the United States was the owner of the land at the time of the severance.

"D. The statute requires the appellants to secure a license from the state of Arkansas before executing their contract with the United States, and subjects them to a fine for failing to do so, and requires them to make monthly reports to the State of Arkansas with respect to the execution of their said contract, and subjects them to a fine for failure to do so."

ARGUMENT

OUTLINE

1. Answers to Questions.
2. Outline to Severance Tax Statute.
3. Acts of Congress That Are Involved
4. The Severance Tax Act Constitutes Direct Interference with the United States.
5. The Act Violates the Supremacy Clause of the Constitution.

Answers to Questions in the Order of the Court Made on October 8

QUESTION 1

"Does the record affirmatively show that the validity of a state statute was drawn in question in the Supreme Court of Arkansas on the ground of its being repugnant to the Constitution or laws of the United States as required by section 237 (a) of the Judicial Code (28 U. S. C., sec. 344)?"

The Supreme Court of Arkansas, in its opinion (R. 23), gives a brief summary of the litigation showing that it was begun by the filing of the certificate by the Commissioner of Revenues, claiming that appellants owed the state the severance tax for timber severed from the national forests; that appellants had applied for injunction (authorized by section 13,386 Pope's Digest); that the state had intervened and sought to sustain the tax; that the Chancery Court denied the state's claim; that the appeal challenges the decree of the Chancery Court.

The Arkansas Supreme Court, under its well established rule, would have affirmed the decree of the Chancery Court, unless it appeared to be clearly contrary to the evidence.

England v. *Scott*, 205 Ark. 47;

Benton v. *Southern Engine & Boiler Works*, 101 Ark. 493;

Leonard v. *Leonard*, 101 Ark. 542.

The Chancery Court held that the tax, if applied to timber severed from the national forest, would be a tax on the operations of the United States and on the right of the United States to harvest the mature timber in its national forests.

The Supreme Court of Arkansas tried the case *de novo* on the record made in the Chancery Court, and in order to secure a reversal of this decree the burden was on the state to show in the Supreme Court that the evidence did not support the findings of the Chancery Court.

England v. *Scott*, *supra*;

McCrite v. *Hendrix College*, 198 Ark. 149.

The argument of the state had to be that the tax was not a direct tax, at most, an indirect and remote tax; but on the other hand the argument of the appellants to sustain the decree of the Chancery Court was that the tax was a direct tax and the statute constituted a direct interference with the United States in the sale of its property, the harvesting of its crop of timber, and the management of its forests.

The complaint that was filed in the Chancery Court stated that the timber in question was cut by the plaintiffs by contract executed by and between the United States and the plaintiffs under authority granted by acts of Congress authorizing sale of timber in the national forests, and that the state of Arkansas was seeking to interfere with privileges which had been granted to the plaintiffs by the United States; that the state's demand was in violation of the said act of Congress and that it was in violation of the supremacy clause of the Constitution and the clause that authorized Congress to dispose of its property (R. 4).

If the complaint was too indefinite, the court on motion of the defendants would have required the plaintiffs to make their complaint more definite and certain (Pope's Digest, section 165), but since no objection was made the court treated the complaint as having been amended to conform to the proof.

Thomas v. *Spires*, 180 Ark. 671;

Bennett v. *Snyder*, 147 Ark. 206;

Simpson v. *Blewitt*, 110 Ark. 87;

Checker Cab Co. v. *Leeper*, 207 Ark. 799.

The Supreme Court of Arkansas in its opinion stated that the appeal "presents the points herein discussed", and states the following points: "Does the immunity of a Federal government instrumentality inure to the benefit of the appellees?" In answering this question, the court started with this proposition: "It is fundamental that the Federal government and its instrumentalities are exempt from state taxation." (Citing *McCulloch* v. *Maryland*, 4 Wheat. 316, and other cases which involved a di-

rect tax or direct interference with the United States). The court also stated this proposition as one of the points presented: "Burden on government operations" (R. 10, 15, 16), and stated that the claim of tax immunity in the case at bar was the same as it had been in *James* v. *Dravo Contracting Company*, 302 US 134, *Mason Co., Inc.*, v. *Tax Commission of Washington*, 302 US 186, and *Alabama* v. *King & Boozer*, 314 US 1 (R. 28); and in all of the cases referred to the principal point presented was whether the statute constituted a direct tax against the United States or a direct interference with its operations.

We, therefore, believe that question number 1 should be answered in the affirmative.

QUESTION II

"Does the record affirmatively show that the argument was made in the Supreme Court of Arkansas that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

There is no direct statement anywhere in the record that such argument was made, but as before stated the Supreme Court of Arkansas said (R. 28) that the claim for tax immunity in *James* v. *Dravo Contracting Company*, *supra*, *Mason Company, Inc.* v. *Tax Commission of Washington*, *supra*, and *Alabama* v. *King & Boozer*, *supra*, "was the same as the claim made by the appellees in the case at bar".

In *James* v. *Dravo Contracting Company*, the second proposition laid down by this Court was "Is the tax invalid because it lays a direct burden on the Federal gov-

ernment?" And after stating this proposition, the Court said:

> "The tax is not laid on the government, its property or officers. The tax is not laid on the government".

In *Mason Company, Inc.* v. *Tax Commission of Washington*, the Court merely stated that it was controlled by *James* v. *Dravo Contracting Company*, but the first proposition in the argument by counsel for appellant was that the tax was a direct burden on the government.

In *Alabama* v. *King & Boozer*, the second syllabus is:

> "In this case, the legal incidence of the tax was on the contractor and not on the United States; the contractor, in buying the material, was not the agent or representative of the government; and the transaction was not such as to place the government in the role of purchaser". (Second Syllabus, page 9).

The record shows that the question before the Arkansas Supreme Court was whether the severance tax statute laid the tax on the government, and the Court could not have considered that proposition without considering the part of the statute which expressly required the severer to collect the tax from the United States as owner of the timber at the time it was severed, and could not have considered that question without deciding whether the statute was repugnant to the Constitution and laws of the United States because of that requirement.

QUESTION III

"Assuming that question (II), *supra*, is answered in the negative, does this Court have jurisdiction to consider

the argument that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

The opinion of the Supreme Court of Arkansas referred to the fact that the statute required the tax to remain a lien on each unit of production (section 13,372 Pope's Digest); that the severed product should not be removed until the tax had been paid (Id. sec. 13,386); and that the statute required the reporting taxpayer to withhold the tax from the proceeds of the severed product (R. 10). The opinion shows that the Court considered the question of whether the severance tax act brought such a burden on the United States or its operations as would invalidate the act. We do not see how the Court could have decided that there was no such burden and how the Court could have considered the sections of the statute referred to without having considered the question of whether the statute was repugnant to the Constitution and laws of the United States because it required the severer to collect the tax from the United States as the owner of the timber at the time of severance.

Dewey v. *Des Moines*, 173 US 193, 198.

In *Dewey* v. *Des Moines*, *supra*, the appellant in the trial court raised only the question that a personal judgment against him was in violation of the 14th amendment. In this Court, he insisted that he should be permitted to argue the proposition that the assessment against his property was laid without regard to any question of benefits and that it exceeded the actual value of the property and constituted the taking of private property for public use without sufficient compensation, and that it was void

as taking property without due process of law. This Court held that these two propositions were not necessarily connected, and said:

> "If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form another ground or reason for alleging the invalidity of the personal judgment, we would have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued."

The Court held in effect that where the record shows that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that the question sufficiently appears. In the instant case, the record affirmatively shows that the state court considered the question of burden on government operations (R. 28) and decided that there was no such burden as would show the act to be invalid. The idea that a state tax is unconstitutional merely because the economic burden of the tax may be passed on to the government has been so completely discarded (*James* v. *Dravo Contracting Company, supra*, *Alabama* v. *King* & *Boozer, supra*) that no lawyer would argue that such an indirect tax would be repugnant to the Constitution of the United States. The argument in the instant case before the Supreme Court of Arkansas was necessarily centered on the proposition that the statute constituted a direct interference with the United States.
interference as distinguished from an indirect and remote

We do not see how the Court could have considered the question of the direct burden placed on the government by the taxing statute without fully considering that part of the statute which required the severer to collect

the tax from the government as the owner of the timber at time of severance.

QUESTION IV

"Do the assignments of error in this Court raise the question whether taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

The assignment of errors raises the point that the statute laid a tax for the privilege of severing the timber while the title was in the United States and that the persons who had the contract with the United States requiring them to sever the timber had to secure from the state of Arkansas a permit before commencing the execution of the contract (R. 35). This assignment indicates a direct interference with the government in the disposal of its timber and in clearing its land of "mature, dead and diseased trees." It seems to us that the fact that the statute required the severer to collect the tax from the United States is an enlargement of the proposition set out in the assignment.

Dewey v. *Des Moines, supra.*

However, as we construe the opinion in *Flournoy* v. *Wiener*, 231 US 253, 259, the Court will also examine the points designated under rule 13 in determining what may be considered. If this is done, there appears to be no doubt that the question that the severer was required to collect the tax from the United States as the owner of the timber at the time of severance may properly be considered.

Outline of Severance Tax Statute

The Supreme Court of Arkansas did not construe the statute except to say that "it is a privilege or license tax levied on the privilege of severing" (R. 15). But it is not an occupation tax that is measured by the total amount of severing done by the taxpayer in a given period. It is a tax for the privilege of severing each tree. The severer is required to apply for a license on forms furnished by the state. He is required to agree that the tax "shall constitute and remain a lien on each unit of production"; and he is required to agree in advance that he will pay the tax (section 13,372 Pope's Digest). The state is given a lien for the tax on any and all natural resources severed (Id. sec. 13,376). The tract of land on which the product is severed is also made subject to the lien (Id. sec. 13,374). The tax and the lien therefore apply to every product severed except forest products severed by the owner for his own personal use and not for commercial gain or profit (Id. sec. 13,374).

The severer is required to make settlement with the state each month. He is required to pay the tax to the state and to collect it from the person who was the owner of the product at the time of severance (Id. sections 13,372 and 13,382). The tax applies as well to one who clears the timber from one acre of land as well as to the person who engages regularly in the business of severing timber.

It is provided that the purchaser of any natural resource shall not permit its form to be changed until the tax is paid, provided that the purchaser may himself pay the tax (Id. sec. 13,386 D, 13,386 E). A complete copy of

the severance tax statute is set out in the appendix of this brief.

Acts of Congress That Are Involved

The national forests were established "to furnish a continuous supply of timber for the use and necessities of the citizens of the United States" (Act March 3, 1891, with amendments, and Act of June 4, 1897, USCA Title 16, sections 471, 475).

Sale of dead, matured, or large trees was authorized "for the purpose of preserving the living and growing timber and promoting the younger growth" (Act June 4, 1897, and amendments, USCA Title 16, section 476). This statute as first enacted required this timber to be used in the state where produced, but section 491 authorizes the Secretary of Agriculture to permit export of such timber from the state where cut.

Acts of Congress set out the different uses which shall be made of the forests and how the money derived from sale of timber shall be used. These include: Revenue for schools and roads (USCA Title 16, section 500); providing tree seeds, cones, nursery stock, etc. (Id. section 504); to promote and protect navigation (Id. section 520); water plants, dams, and reservoirs, etc. (Id. section 522, 524); for protection of municipal waterworks (Id. section 552 A); to aid in enforcement of the laws of the states with regard to stock, prevention and extinguishment of forest fires and protection of fish and game (Id. section 553); to cooperate with the states in procuring forest seeds, trees, and plants (Id. section 567); cooperation with the states in acquisition and administration of state forests (Id. section 567 A). USCA Title 16, section 576 B, au-

thorizes the Secretary of Agriculture to require the purchaser of timber to make deposits in addition to the payments for the timber to cover cost to the United States (1) planting (including production or purchase of young trees) (2) sowing with tree seeds (3) cutting, destroying, or otherwise removing undesirable trees * * * in order to improve the future stand of timber.

The Severance Tax Act Constitutes Direct Interference with the United States

No state may be permitted to interfere with or embarrass the United States in the disposal or management of its property.

Constitution of the United States, Article 4, sec. 3, Clause 2;

U. S. v. *Allegheny County*, 322 US 174;

City of Springfield v. *U. S.* (CCA) Mass. 99 F. (2d) 860, cert. den. 306 US 650.

By the terms of the contract between the United States and appellants, the title to the timber was in the United States at the time it was severed. The act requires the severer to collect the tax from the owner of "such natural resource at the time of the severance" (Pope's Digest, section 13,382). Failure to comply with such requirements is declared to be a misdemeanor (Id. last clause). A lien is given to the state on the land from which the product is severed (Id. section 13,374 last clause), and a lien is given on the severed product (Id. section 13,376). In order to enable the state to enforce its lien on the land, the severer's monthly reports must show the "place where severed or produced" (section 13,373, second clause).

The act not only places a direct tax on the United States, but it contains many regulatory provisions which would directly hamper the United States in the management of its forests and disposal of its property, the requirements for securing a license before any trees may be cut, monthly reports of severings, forbidding transportation of the logs (section 13,386 E), requiring reports by those who purchase the severed product and forbidding any change in the form of severed product (section 13,386).

The Act Violates the Supremacy Clause of the Constitution

All of the activities of the Federal Government must be free from taxation or regulation by a state.

Constitution of the United States, Article 6, Clause 2;

McCulloch v. *Maryland*, 4 Wheat. 316;

Osborn v. *Bank of U. S.*, 9 Wheat. 738;

C. O. & G. R. Co. v. *Harrison*, 235 US 292;

Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 US 522;

Howard v. *Gypsy Oil Co.*, 247 US 503;

Large Oil Co. v. *Howard*, 248 US 549;

Oklahoma v. *Barnsdall Refineries*, 296 US 521;

Mayo v. *U. S.*, 319 US 441;

Johnson v. *State of Maryland*, 254 US 51;

Ohio v. *Thomas*, 173 US 276;

Hunt v. *U. S.*, 278 US 96;

Arizona v. *California*, 283 US 423.

No matter how urgent the need may be for removing the matured, dead, and diseased trees to promote the growth of the younger trees, the State of Arkansas, by its severance tax statute, would stop any person having a contract with the United States before he had laid an ax to a tree, would fine him, and, as a means of enforcing payment of the fine, confine him to jail. The right of the United States to be free from such interference has rarely been questioned. In this Court, there has never been any division of opinion on the question. In every case which has involved any such direct interference with the government's contract, the opinions of this Court have been without dissent.

The Supreme Court of Arkansas held that the instant case was controlled by *James* v. *Dravo Contracting Company, supra*, an income tax case, and *Alabama* v. *King & Boozer, supra*, a sales tax case; but we do not believe that the sales tax cases and income tax cases are applicable at all. This Court held that a tax on income earned under a government contract and a tax on purchase of materials used by the contractor in execution of his contract were in the same category as a tax on the contractor's property that was used in performance of his contract; that if it put any burden at all on the government, it was an indirect and remote burden caused by the fact that the final cost to the government might be increased by adding the tax or a part of it to the price the government would have to pay. But the question of cost to the government does not enter into the cases which we have cited, which we believe control the case at bar. In these cases, it is merely a question of an entire lack of power to place anything in the way of the government's contract or the execution of it or to offer any direct interference with the government in its activities.

The Supreme Court of Arkansas, after referring to *C. O. & G. R. Co.* v. *Harrison*, *supra*, and *Oklahoma* v. *Barnsdall Refineries*, *supra*, said:

> "We distinguish these cases in two ways (1) they were decided prior to *James* v. *Dravo;* (2) in these cases, the minerals were held by the United States as trustee for the Indian tribes".

It is true that the minerals were held by the government as trustee for the Indian tribes; but the national forests are held by the government as trustee of the people of the United States to provide them with a continuous supply of timber. Its obligation to the Indians is no greater than its obligation to the citizens of the United States.

If the Supreme Court of Arkansas had observed that the Indian land cases were decided by unanimous opinions, this might have caused the court to doubt that those cases were in the same class as *James* v. *Dravo Contracting Company*. Wherever a case has been decided on the principle that an indirect burden would render the tax invalid, the Court has been divided.

Panhandle Oil Co. v. *Mississippi*, 277 US 218;

Indian Motorcycle Co. v. *U. S.*, 283 US 570;

Graves v. *Texas Co.*, 298 US 393;

Gillespie v. *Oklahoma*, 257 US 501.

Until the views of the minority were accepted by the Court,

Trinity Farm Construction Co. v. *Grosjean*, 291 US 472;

James v. *Draco Contracting Company*, *supra*;

Helvering v. *Gerhardt*, 304 US 405, 416;

Alabama v. *King & Boozer*, *supra*.

The principles which controlled *James* v. *Draco Contracting Company* had already been decided in *Metcalf* v. *Mitchell*, 269 US 51, which was referred to as a pivotal case in *James* v. *Draco*. But *Metcalf* v. *Mitchell* was not even mentioned in *Oklahoma* v. *Barnsdall Refineries*, *supra*, which was decided at a later date. We believe that the distinctions made by the Arkansas Supreme Court are wholly untenable. We can find no case which overrules or modifies the principle that "a tax on the leases is a tax on the power to make them and could be used to destroy the power to make them".

Indian Territory Illuminating Oil Co. v. *Oklahoma*, *supra*.

Since the Arkansas severance tax statute places a tax on the United States and would regulate and control the government in the management of its forests and disposal of its property, the statute is unconstitutional.

We, therefore, believe that the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted

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SCOTT WOOD

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APPENDIX

THE ARKANSAS SEVERANCE TAX

(Pope's Digest, Sections 13,371-13,386, inclusive)

"Sec. 13371. *Tax levied.* There is hereby levied a privilege or license tax, to be known as "the Severance Tax", for the year 1923 and for each subsequent year, upon each person, firm, corporation, or association of persons, hereinafter called "the producer", engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds, and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine, and all other forest products and all other natural products of the soil or water of Arkansas. Section 1, Act 118 of 1923.

"Sec. 13372. *Permit to sever resources.* Any person, firm, corporation or association desiring to engage in the business of severing natural resources as contemplated by this Act, shall before entering upon such business, make application for license or permit therefor to the Commissioner of Revenues.

"Such application shall, on forms to be prescribed by the Commissioner, state under oath the name of the applicant, the business in which applicant desires to engage, and the counties in which the operations are to be carried on, and the amount and value of the anticipated produc-

tion of the ensuing month based on applicant's operation for the preceding month. In such form the applicant shall expressly agree to abide by the provisions of this Act and promptly to pay the severance tax hereby imposed upon its subsequent ascertainment based upon the Producer's Report as hereinafter required.

"The applicant shall expressly obligate himself to pay at the end of the ensuing monthly period, as hereinafter prescribed, the amount of such estimated tax, more or less according to the actual production, and shall consent that such severance tax shall constitute and remain a lien on each unit of production until paid into the State Treasury as hereinafter provided.

"Upon the filing of such application, the Commissioner shall estimate the amount of the tax which shall accrue as based upon said anticipated production and shall issue a permit, wherein shall be stipulated such estimated amount.

"Whoever shall engage in the business of severing natural resources, without having made application for and secured a license or permit, as contemplated by this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five ($25.00) dollars nor more than One Hundred ($100.00) Dollars. Ib. Sec. 2, as amended by Act 283 of 1929, Sec. 1, March 29, 1929.

"Sec. 13373. *Producers to report to Commissioner of Revenues.* Every producer shall, within ten days after the end of each month, file with the Commissioner of Revenues, a verified report of the business conducted by such producer during the past preceding month.

"Said Producer's Report shall be made upon forms prescribed by the Commissioner of Revenues, and shall truly set forth the kind of natural resources and place where severed or produced, the gross quantity and actual cash value thereof, and such other reasonable and necessary information as the Commissioner may require for the proper enforcement of the provisions of this Act.

"The report required by this Section shall be signed and sworn to by the individual producer or by a member of the producing firm, if a partnership, or by the president, secretary or managing producer, if a corporation. A willful, false swearing as to the contents of said report shall constitute the crime of perjury and shall be punished as such.

"The report herein prescribed shall be prepared and executed in triplicate, one copy of which shall be by the producer filed with the County Clerk in the county wherein the producer is doing business. Said report so filed shall be preserved as a public record.

"The failure of any person, firm, corporation or association to make the statements required by this Section shall be punished by fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) for each offense. Ib. Sec. 3 as amended by Act 283 of 1929, Sec. 2.

"Sec. 13374. *Privilege Tax.* Except as to the production of certain natural resources, the privilege tax upon which is hereinafter specially provided for, each producer at the time of rendering such monthly report, shall concurrently file a duplicate thereof with and pay to the State Treasurer, through the Commission of Rev-

enues, a privilege tax amounting to two and one-half (2½) percent of the gross cash market value of the total production of such natural resources during the preceding monthly period.

"The value of such products shall be computed as of the time when and at the place where the same have been severed or taken from the soil or water, and in their unmanufactured state immediately after such severance. Provided, this Act shall not apply to nor shall any severance tax be required of the individual owner of timber who occasionally severs or cuts from his own premises such stocks, logs, poles or other forest products as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use and not for sale, commercial gain or profit.

"Every person, firm, corporation or association, severing any natural resources under the provisions of this Section, shall be liable to the State for the severance tax imposed herein, and in addition thereto the tract of land from which product was severed shall be subject to the lien hereinafter created. Ib. Sec. 4, as amended by Act 283 of 1929. Sec. 3.

"(*Floyd* v. *Miller Lumber Company*, 160 Ark. 17, 245 S. W. 450. The tax levied by this act on those engaged in the business of severing timber from the soil is a privilege tax on the occupation, and not a property tax, and is unconstitutional.)

"Sec. 13375. *Tax on bauxite; coal; timber.* (a) On Bauxite. Every producer of bauxite shall be subject to

all of the provisions of this act, except that instead of a tax of two and one-half ($2\frac{1}{2}\%$) percent of the gross market value of said product, the producer of bauxite shall pay a privilege tax equivalent to twenty-five cents (25c) per ton on the total production of bauxite during the preceding quarterly period, irrespective of the market value thereof.

"(b) On Coal. Every producer of coal, shall be subject to all of the provisions of this act, except that instead of a tax of two and one-half ($2\frac{1}{2}\%$) percent of the gross market value of said products, the producer of coal shall pay a privilege tax equivalent to one cent (1c) per ton on the total production of coal during the preceding quarterly period, irrespective of the market value thereof.

"(c) On Timber. Every producer of timber shall be subject to all the provisions of this Act, except that instead of a tax of two and one-half ($2\frac{1}{2}\%$) percent of the gross market value of said products, the producer of timber shall pay a privilege tax equivalent to seven cents (7c) per thousand feet board measure on the total stumpage severed or cut during the preceding month, irrespective of the market value thereof. Provided that no tax herein levied shall apply to the producer of switch ties who hews out or makes such ties entirely by hand. Ib. Sec. 5 as amended by Act 116 of 1933. Sec. 1.

"Sec. 13376. *Lien on resources for tax.* The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources. Act. 118 of 1923, Sec. 6 as amended by Act 283 of 1929. Sec. 4.

"Sec. 13377. *Tax on Timber paid into State Treasury—Credit of State Forestry Fund.* After the passage of this Act all severance tax collected on timber under existing provisions of law shall, upon payment into the State Treasury, be credited to the "State Forestry Fund" to be used by the State Forestry Commission for the development of forests of the State. Act 158 of 1937, approved March 1, 1937. Sec. 1.

"Sec. 13378. *Transporters required to furnish information.* When requested by the Commissioner of Revenues, or his duly authorized agent, all transporters of natural resources, as is subject to a Severance Tax, as contemplated by Act 118 of the Acts of 1923, as amended, out of, within, or across the State of Arkansas, shall be required to furnish said Commissioner of Revenues, under oath and upon forms prescribed by him, any and all information relative to the transportation of such natural resources, and such reports shall contain, in addition to other required information, the name of the shipper, date of shipment, quantity and type or character of such natural resource, stated in units of measurement applicable to such natural resources, the point of receipt or shipment and point of destination. Provided that no provision of this act shall be construed as applying to pipe line transportation. Act 333 of 1937, approved March 25, 1937.

"Sec. 13379. *Penalty.* The failure of any person, firm, corporation or association to make such transporter's report, required by Section 13378, shall be punished by fine of not less than Fifty ($50.00) Dollars and not more than Five Hundred ($500.00) Dollars for each offense. Id. Sec. 2.

"Sec. 13380. *False oath is perjury.* Any person who shall intentionally make any false oath to any report required by the provisions of this Act shall be deemed guilty of perjury and shall be subject to all penalties prescribed for said crime. Id. Sec. 3.

"Sec. 13381. *Procedure against delinquencies.* After the date fixed for the filing of each monthly report, and from and after such due date a penalty of twenty-five per-cent (25%) shall be added to the amount of such tax. If any producer shall fail within the time herein prescribed to make the sworn report of the quantity and value of the natural products so severed during the preceding monthly period, it shall be the duty of the Commissioner to examine the books, records and files of any such producer to ascertain the amount and value of such production during the preceding month and to assess the severance tax based thereon according to the procedure hereinafter in Section 13384, and to add thereto the cost of such examination, together with a penalty of twenty five (25%) percent on the amount of said tax, and to certify the amount of such tax, cost and penalty to the State Treasurer for collection; provided, an appeal may be taken by any aggrieved producer to the Chancery Court having jurisdiction. Ib. Sec. 7 as amended by Act 283 of 1929, Sec. 5.

"Section 13382. *Who liable for tax.* Except as otherwise in this Section provided, the making of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor.

"The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

"And in the case of oil and gas, such production as shall be sold or delivered to any pipe line company and transported by it through pipes connected with the oil or gas well of the owner shall notwithstanding such sale or delivery be liable for the tax herein levied.

"Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment.

"Any person, firm, corporation or association failing or refusing to comply with any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00) for each offense. Ib. Sec. 8, as amended by Act 283 of 1929. Sec. 6.

"(*McFarlane* v. *Giller*, 174 Ark. 94, 294 S. W. 3. The lessor of oil and gas lands is not liable for such tax.)

"Sec. 13383. *Additional Data. Books and Papers.* The Commission shall have the power to require any producer to furnish such additional information as may be

deemed necessary for the fair determination of the amount of said privilege tax; and for said purpose it may examine the books, records and files of such producer; and to that end the Commission shall have power to issue subpoenas and examine witnesses.

"If, at the request of the Commission, any such witness shall wilfully fail to appear, or refuse access to such books and papers, the Commission shall certify the facts and the name of the recusant witness to the Circuit Court of the county having jurisdiction of the producer. The said court shall thereupon issue a subpoena commanding the said witness to appear before the Commission, at a place designated, on a day fixed, to be continued as occasion may require, and to give such evidence, and to open for inspection such books and papers as may be required for the purpose of ascertaining whether or not any report so made is true and correct.

"Whenever it shall appear to the Commission that any producer has unlawfully made an untrue or incorrect report, the Commission shall correct such report and shall assess said privilege tax thereon, and shall certify the same to the State Treasurer for collection. Ib. Sec. 9.

"Sec. 13384. *Enforcement of collection.* When any privilege tax levied hereunder shall become delinquent, the Commissioner shall certify the amount of such tax together with the penalties thereon to the Circuit Clerk of the county wherein the same or any part thereof accrued. And it shall be the duty of said clerk to file such certificate of record and to enter the same upon the docket of the Circuit Court for judgments and decrees under the procedure prescribed for filing transcripts of judgments

by Sections 8440 and 8442. Execution shall thereupon be issuable forthwith by the clerk of the Circuit Court directed to the sheriff, who shall make a levy thereon upon any property, assets and effects of the producer against whom the privilege tax is assessed.

"The sheriff, making such levy, shall be responsible on his official bond therefor, and within ten (10) days after collection shall pay over such tax, cost and penalty to the State Treasurer, taking proper receipt therefor.

"The clerk and sheriff shall receive the same fees for service required under this section as are now provided by law for similar services.

"If it shall become necessary in the administration of this section to file suit for the collection of any delinquent tax, such suit may be brought by the Commissioner of Revenues, in the county to which said tax has been certified. The Commissioner of Revenues is authorized to employ an attorney to prosecute such suit or to prosecute or defend any suit brought under the provisions of Section 13381, and he shall be authorized to pay out of any sum collected such amount as attorney's fee as the court trying the case may fix. Ib. Sec. 10, as amended by Act 283 of 1929. Sec. 7.

Sec. 13385. *Property tax unaffected.* The payment of the severance tax hereby imposed is in addition to the general property tax, and payment of the severance tax shall not affect the liability of the producers for all State, county, municipal, district and special taxes upon their real estate and other corporeal property; but no other tax in addition hereof shall be imposed upon the

rights to produce in this State those resources whose production is made the basis of the severance tax. Ib. Sec. 11.

"Sec. 13386. *Purchaser's sworn statements.* (a) It is hereby made the duty of all purchasers, consignors and other dealers of whatever nature in any natural product severed from the soil or water of Arkansas to file monthly with the Commissioner of Revenues a verified statement, showing the names and addresses of all persons, firms, corporations, associations or syndicates from whom such purchaser, or dealer, has acquired any such natural product during the preceding month, together with the total quantity of and gross value paid for each such purchase or consignment.

"(b) Such statement, made upon forms prescribed by the Commissioner, shall be filed within ten days after the expiration of each month, and shall be sworn to by the purchasing agent of the dealer or consignee, or by the officials or agents of such purchasers, corresponding with those required in Section 3 herein to verify the producer's reports.

"(c) The failure of any person, firm, corporation or association to make the statements required by this Section shall be punished by a fine of not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00) for each such offense.

"(d) The purchaser of any severed natural resource as defined or contemplated in this act, or agent for such purchaser, whether he be a resident or nonresident person, corporation, partnership, fiduciary, or otherwise, shall not permit the manufacture or changing from its

natural state at the time of severance any natural resource so severed, until and after the tax as provided by law on same has been paid. There is hereby imposed on said purchaser the duty of first ascertaining whether or not the tax prescribed by law is paid on such severed natural resources before changing in any manner from its natural state at the time of severance, or for moving it to a destination with the intention of changing its natural state without the tax on same being first paid.

"(e) Provided, that in cases where the producer or severer has not paid the tax, the said purchaser, manufacturer, his agent, or otherwise, shall do so before manufacturing or changing in any way said resource from its natural state. Provided that in cases where it is impracticable for the purchaser to pay the tax before changing the severed resource from its natural state, the said purchaser shall pay said tax on or before the 10th day of the month subsequent to the changing of the severed resource from its natural state. Until and after the tax herein before provided shall have been paid by the said purchaser, if not already paid by said producer or severer, such severed resources shall not under any circumstances be removed from the State, or be removed from point of severance to any place of assembly or place of concentration within the State, except as is convenient, practicable and consistent for such purchaser in the conduct of his business. That if before payment by either the producer or purchaser said severed natural product is manufactured or its original state changed, or if such natural product is removed from point of severance to a point of assembly of concentration with intent to withhold the whereabouts of said product, as provided in sub-section (f) herein, then the liability for said unpaid tax as pro-

vided herein shall be primarily binding upon said purchaser, and each separate case or instance of removal, manufacture, or otherwise changing the state of the product shall be construed to be a separate offense and the penalty and fine provided in sub-section (h) of this section shall be individually assessed in each case or instance against such purchaser or producer violating the provisions of this act.

"(f) That removal of such severed resources from the State by any means, or to any point of concentration or assembly not in line with or consistent with the conduct or operation of the general business of the purchaser or producer, shall be deemed an attempt to withhold the whereabouts of such severed products and be in wilful violation of the provisions of this act; and such act or removal shall be deemed and construed to be an intention to change the natural state of such natural resource upon which tax has not been paid; and such act or acts of removal shall be punished by a fine as hereinafter provided.

"(g) Each individual or single case or instance of removing said severed resources without tax being paid, as provided in this section, or each and every case or instance where such severed resource is by manufacture, grinding, sawing, crushing, screening or by whatever process or procedure of whatever nature changed from its natural state, without the tax being paid, shall constitute a separate and distinct offense and each separate offense shall be punished by fine and penalty as provided in this section.

"(h) That violation of the provisions of this section shall subject the purchaser to a fine of not less than Fifty

($50.00) Dollars and not more than Five Hundred ($500.00) Dollars for each offense. In all cases where producer or purchaser is assessable for the tax, as provided in subsection (e) herein and demand is made upon him by the Commissioner of Revenues, or his duly authorized agents, for said tax and same is not paid within fifteen (15) days after receipt of said demand, a penalty of 25% of the said tax due is hereby levied and assessed.

"(i) If any purchaser, producer, or his agent shall fail to pay the privilege or excise tax, the Commissioner of Revenues is empowered and directed to compute said tax on the basis of such information as may be available and certify the same to the Clerk of the Circuit Court of any County in this State in which said purchaser or producer is operating or doing business, and it shall be the duty of the clerk to file such certificate of record and enter the same upon the docket of the Circuit Court for judgments and decrees under the procedure for filing transcripts of judgments by Sections 8440 and 8442. Execution shall thereupon be issued by the clerk of the Circuit Court, directed to the sheriff who shall make levy on any property, assets or effects of such purchaser or his agent against whom the tax is assessed. The Sheriff making such levy shall be responsible to the state on his official bond therefor and shall pay over such tax and penalty thereto if collected, to the State Treasurer, through the Commissioner of Revenues. The Clerk and Sheriff shall receive the same fees for services under this section as are now provided by law for similar services. Provided, that any aggrieved purchaser or his agent may appeal to the Chancery Court having proper jurisdiction, for an injunction against such tax. This sub-paragraph shall be construed to be separate and distinct from other sub-

paragraphs in this section providing for fines and penalties and is supplemental thereto.

"(j) No bond for costs shall be required in any court of this State for prosecution in criminal actions, nor in civil actions, for violations of the provisions of this Act and in all causes at law or in equity the State of Arkansas shall have the same right of appeal as any individual person.

"(k) The Commissioner of Revenues shall have the power to make such rules and regulations as he deems requisite and advisable for the administration of this Act, relating to the manner, ways and means of enforcing the provisions of same. * * * *

"Ib. Section 12 as amended by Act 283 of 1929, as amended by Act 138 of 1933, sec. 1, approved March 24, 1933. * * * * *

"Ib. Section 14, as amended by Act 775 of 1923, approved March 28, 1923."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 328

WARREN W. WILSON, ET AL.,

Appellants,

vs.

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS,

Appellee

MOTION TO AFFIRM AND DISMISS IN PART

Comes now Otho A. Cook, Commissioner of Revenues for the State of Arkansas, as cross-appellant and moves the Court to affirm that part of the opinion of the Arkansas Supreme Court decided in favor of the cross-appellant and to dismiss the appeal of the appellants, Warren W. Wilson, et al.

For this and all other relief to which he is entitled the cross-appellant respectfully prays.

THOS. S. BUZBEE,
HERRN NORTHCUTT,
Attorneys for Appellee and Cross-Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1945

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY ..... *Appellants*

v. No. 328

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS ..... *Appellee*

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS ..... *Petitioner*

v. No. 329

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY ..... *Respondents*

APPEAL FROM
SUPREME COURT OF ARKANSAS
AND
CERTIORARI FROM
SUPREME COURT OF ARKANSAS

BRIEF OF APPELLEE ON APPEAL AND PETITIONER ON WRIT OF CERTIORARI

R. S. WILSON
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Solicitors for Appellee on Appeal and Petitioner on Writ of Certiorari

PARAGON PRINTING CO., LITTLE ROCK

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OCTOBER TERM, 1945

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STATEMENT OF THE CASE

Appellant's statement of the case on page 1 of its brief is erroneous. Appellant says the Supreme Court of Arkansas "upheld the Arkansas severance tax statute, which laid a tax on the privilege of severing timber from

the national forests while title to the timber remained in the United States". It is the contention of the Commissioner of Revenues of Arkansas that the tax is laid on the severer, and the United States is not the severer. The United States required the Appellant to deposit $2500 by way of bond (appellant's br. 6), and a sum in cash not less than $1000 and not over $5000 (R. 9) as advanced payment, and to keep said amount paid in, until just before the "completion of the sale when the amount of the payment may be reduced in writing by the Forest Supervisor".

It has never been contended by the Arkansas Commissioner of Revenues, and no assessments for Severance Tax has been made against the United States or any of its instrumentalities, but when the United States contracts with individuals to remove timber from its lands, and the severer places it in commercial channels, the Commissioner does seek to tax it. Paragraph 2 of plaintiff's complaint (R. 3) plainly states that "plaintiffs are and were at the times hereinafter mentioned engaged in the business of severing timber from the soil and converting same into lumber, and doing wholesale and retail lumber business". The United States Government is not so engaged, is not a severer or producer of severed products, and therefore does not come under the provisions of the Arkansas Severance Tax Act, and indeed, could not come under its provisions. The severing contract provided that "No timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured, or counted by the Forest Officer" (R. 12).

There is no allegation in appellant's complaint that the United States severs the timber, and there is no con-

tention that the Arkansas Commissioner of Revenues is attempting to assess or collect a tax from, or otherwise hold the United States responsible in any way for the payment of the tax. It is simply an idea of defense on the part of the appellant to escape payment of the tax.

The allegations in appellant's complaint (R. 3-5), its Petition for Rehearing (R. p. 32-34), its "Statement and Designation under Paragraph 9, Rule 13" (R. 39-40), and its "Statement of Points to be Relied Upon and Designation as to Record Pursuant to Rule 13, Sub-division 9" (R. p. 41), recite entirely different statements of appellant's allegations and reasons. None of them are alike, and none of them are in keeping with the requirements of Section 237 (a) of the Judicial Code as amended, 28 U. S. C. Sec. 344.

There is nothing in this record to indicate that appellant is an instrumentality of the U. S. Government, or that the collection of the tax from appellant would in any way affect the United States Government in its Forest Reserve work, or in any other way. There is not a single allegation contained in appellant's Petition for Rehearing in the Supreme Court of Arkansas that compares with or means the same as either allegation in its Petition for Appeal to this Court (R. pp. 32-33 and 34-35).

It is impossible from the printed record in this case to determine definitely what questions were before the Supreme Court of Arkansas.

RECORD OF CROSS APPEAL OR WRIT OF CERTIORARI

The assignment of Errors in the Petition for Cross Appeal on behalf of Arkansas Revenue Commissioner, and treated by this Court as a Petition for Writ of Certiorari, as provided by 28 U. S. C. Sec. 344 (c), is the single allegation:

"The Supreme Court of Arkansas erred in ruling in its opinion of April 2, 1945, (L. R. p. Vol. 83, No. 1, page 938), that the appellants, Warren W. Wilson, et al., are not liable to the State for Severance Tax on timber severed by them from lands held by the United States as original owner, (U. S. C. A. Title 16, Par. 471)" (R. 38).

In Cross Appellant's Statement of Points to be Relied Upon Designation as to Record Pursuant to Rule 13, Sub-Division 9, in addition to his Assignment of Errors, the judgment of the Supreme Court of Arkansas is assailed as violative of U. S. C. A. Title 16, Par. 480, wherein is stated that all criminal and civil jurisdiction, with certain exemptions, shall remain in the State and that no citizen shall be relieved of his obligations to the State by enactment of the Statute (R. 41).

BRIEF AND ARGUMENT

Hereafter we shall endeavor to discuss the four questions presented by this court, in the order of their number, as set out on page 42 of the printed record.

The writer of this brief has been furnished with a proof sheet copy only of appellant's brief, and presuming that the finished brief will be as the proof copy, we proceed to a discussion of the four questions, as follows:

QUESTION NUMBER 1

> "1. Does the record affirmatively show that the validity of a state statute was drawn in question in the Supreme Court of Arkansas on the ground of its being repugnant to the Constitution or laws of the United States as required by section 237 (a) of the Judicial Code (28 U. S. C., Sec. 344)?"

Plaintiff's complaint under paragraph 5 thereof recites:

> "And the state's demand against the plaintiffs is in violation of the Acts of Congress above referred to".

And the first part of said paragraph 5 alleges that the plaintiffs were severing the timber under "authority granted by Acts of Congress, authorizing sale of timber in the National Forests" (R. p. 4).

The decision of the Chancery Court of Garland County (fol. 28) recites as follows:

"That the Arkansas severance tax, if it be applied to timber severed from the National Forest pursuant to agreements, such as those introduced in evidence in this cause between the United States and the persons severing said timber, would be a tax upon the operations of the Government of the United States and a tax on the right of the United States to harvest the mature timber on its National Forests; and the Arkansas severance tax does not apply to the timber severed by the plaintiffs from the National Forest" (R. p. 21).

There is no other question mentioned in the decree of the Garland Chancery Court in its decision of the questions involved.

The appellant, Wilson Lumber Company, in its petition for rehearing makes no mention of the Constitution of the United States nor of the violation of any federal law. It, therefore, is presumed that it was not contending that the statute of Arkansas violated any portion of the Federal Constitution or Federal laws. The petition for rehearing contains four paragraphs. Paragraph 1. That the court erred in holding that the tax was not a direct tax on the United States. Paragraph 2. That the court erred in holding that the tax did not interfere with the Government's business. Number 3. That the court erred in holding that the severance tax statutes do apply to the timber severed in the National Forest. Number 4 is a plea that the Commissioner of Revenues be permitted to amend his Certificate of Indebtedness filed in the Garland Circuit Clerk's office to claim tax for the timber severed from lands acquired by the United States under the provisions of Title 16, Section 516 U. S. C. A. (R. pp. 32-33).

Appellant's petition for appeal to this court dated July 6, 1945, makes no mention whatsoever that the Arkansas statute is in violation of the constitution and laws of the United States as required by said Section 237 (a) of the Judicial Code (28 U. S. C., Section 344) (R. pp. 34-35).

It will thus be seen that the question never having been decided by the Chancery Court of Garland County, Arkansas, and never having been reviewed by the Supreme Court of Arkansas could not and is not affirmatively shown by this record to be properly before this court for adjudication.

QUESTION NUMBER II

> "2. Does the record affirmatively show that the argument was made in the Supreme Court of Arkansas that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

There is no mention in the complaint that the severer is required to collect the tax from the United States. No mention of such requirement is found in the Chancery Court decree of Garland County. No mention of such requirement is found in the motion for rehearing before the Supreme Court of Arkansas, the petition for appeal to this court, and is first mentioned in paragraph C in appellant's "statement and designation under paragraph 9, rule 13", filed August 27, 1945 (R. p. 40).

In fact, appellant, in its brief on page 13, admits that it has made no direct reference in this record of any

affirmative contention before the Supreme Court of Arkansas, that the Arkansas law requires the severer to collect the tax from the United States.

On pages 31 and 32 of appellant's brief will be found that portion of Arkansas' severance tax law appearing as Section 13382 of Pope's Digest of the Statutes of Arkansas as follows:

> "*Who liable for tax.* Except as otherwise in this section provided, the making of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products, whether as owner, lessee, concessionaire or contractor.
>
> The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total part due by the respective owners of such natural resources at the time of severance".

We fail to find a reference to this section of law in the record before this court. Hence, we refer to it from appellant's brief at pages 31 and 32.

We fail to find any other reference to said question Number 2 in the record and therefore contend that the question is not affirmatively shown by this record as having been properly submitted to the Supreme Court of Arkansas.

According to said Section 13382 of Pope's Digest, the severer is not required to make the collection of the

tax from the United States, for the United States is not a severer of natural products under the meaning of said section but when the appellant, Wilson and Company, severs said products for market purposes it becomes liable as a severer or producer as defined by the above section and becomes liable for the payment of the tax. Wherein does the liability of Wilson and Company interfere in any way with the rights of the Federal Government under its contract with the appellant? There is no provision under the above section that the United States Government will be held responsible for the payment of said tax and so long as no demand is being made by the State of Arkansas that the United States Government is liable for tax on said severed products, we think such contention on the part of appellant, Wilson and Company, is far fetched and amounts to a moot question. We think the United States is the only rightful party to make such contention. A private contractor, such as Wilson and Company, certainly is not an instrumentality or agency of the Federal Government and we pursue that argument no further. A reading of appellant's brief, pages 13 and 14, will disclose that the appellant really admits that Question No. 2 does not affirmatively appear by the record to have been before the Supreme Court of Arkansas for determination.

QUESTION NUMBER III

"3. Assuming that question (2), *supra*, is answered in the negative, does this court have jurisdiction to consider the argument that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States? Compare *Dewey* v. *Des Moines*, 173 U. S. 193, 198."

It is the contention of the appellee that there is no requirement in the Arkansas law that the severer shall collect the tax from the United States. There is no allegation in the complaint in the Garland Chancery Court, in the petition for a rehearing before the Supreme Court; the question was never presented to nor decided by the Garland Chancery Court and, therefore, is not shown in this record to have ever been decided by any court. Therefore, it is the contention of the appellee, supported by this record, that the question is not before this court and that it is without jurisdiction to determine said question.

QUESTION NUMBER IV

> "4. Do the assignments of error in this Court raise the question whether the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

We here quote the language of this court as to the requirement for compliance with Section 237 (a) of the Judicial Code as to the necessity of affirmatively showing in the record on appeal to this court the questions before the State Supreme Court. Many case are to be found and the late case of *Flournoy* v. *Wiener*, 321 U. S. 253, is a very recent case and the rule is clearly expressed as follows:

> "Section 237 (a) of the Judicial Code authorizes an appeal to this court from the judgment of the highest court of the State 'where is drawn in question' the validity of a statute of the United States and the decision is against its validity. The error is therefore ore cognizable on appeal. The question for our decision is whether, the State Court having rested its decision and judgment upon two

independent grounds, each adequate to support the decision, but only one of which appellant has assigned as error on appeal to this court, we have jurisdiction to decide either.

* * * *

"It is a familiar rule, consistently followed, that upon appeal from a State Court this court will not pass upon or consider federal questions not assigned as error, or designated in the points to be relied upon, even though properly presented to and passed upon by the State Court" (p. 259).

We, therefore, assume that in keeping with the requirements of said Section 237 (a) and the numerous decisions of this court upholding its requirement and this record being silent as to the presentation of the question to the Chancery Court or to the Supreme Court of Arkansas, said question is not before this court for determination.

The Judgment of the Arkansas Supreme Court

There is no question but that the Arkansas Supreme Court had jurisdiction to render judgment in the cause, for it tries *de novo*, all cases on appeal from the Chancery Courts of Arkansas. In addition to the stipulation of facts filed in the Garland Chancery Court (R. pp. 6-7) the depositions of two witnesses, the affidavit of a witness, together with the Severance Contract entered into by the severer, Wilson & Company, with the United States, were all before the Chancellor, and on appeal were all before the Arkansas Supreme Court, in the transcript, where the Supreme Court tried the case, *de novo*, rendering its judgment, which is found in the printed record herein, beginning on page 22 and ending on page 31. After recit-

ing the Statement of the Case, the contentions of the parties, the substance of the Severing Contract, the filing of the Certificate of Indebtedness for the tax (R. pp. 22, 23) as a judgment in the Garland Circuit Court, it proceeds to a determination, as follows:

"I. Was the Arkansas Severance Tax Law Intended to Apply to Persons Severing Timber from Lands of the United States in a National Forest. We answer the question in the affirmative". Then the Court proceeds to a particular explanation of the Arkansas Severance Tax Law, consisting of its several Legislative Acts, and the decisions of the Arkansas Supreme Court in its earlier decisions, with citations from Standard Law Publications, and ends its first declaration with "and the tax would apply to the case at bar, as the transaction here involved does not come within either exemption".

Then it discusses the contention of the appellant that it is an Instrumentality of the Government, as follows:

"II. Does the Immunity of a Federal Government Instrumentality Inure to the Benefit of the Appellees?" Its first statement is: "It is fundamental that the Federal Government and its instrumentalities are exempt from State taxation. * * * On the other hand, the tax immunity does not inure to a person, firm, or corporation merely because such claimant has a contract with, or a grant from, the Federal Government. The Court cites numerous state and U. S. Supreme Court decisions in support of both statements, finally predicating its decision upon the cases of *James* v. *Dravo Construction Co.*, 302 U. S. 134; *Mason & Co.*, 302 U. S. 186, both of which are clear and decisive that mere contractors with the Federal Government do not constitute Government Instrumentalities (R. pp. 24-26).

Then, on pages 28 and 29 of the printed record, the Court discusses whether or not the Severance Contract with the Government constituted a "Burden on Government Operations", and states: "We hold that the appellees, in cutting and removing the timber, acted as independent purchasers, and not as a Government Instrumentality, and that it is not a tax on Government Operations". Then is recited the decision of the case of *Buckstaff* v. *McKinley*, 198 Ark. 91, as affirmed by this Court in 308 U. S. 358, wherein this Court said:

> "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter". Then, "So we hold that the appellees are not entitled to claim any tax immunity as a Government Instrumentality, or because of Governmental operation, and are liable for severance tax on all timber cut from land that became a part of the national forest by Governmental Acquisition under U. S. C. A. Title 16, Section 516".

As to Lands in Which the Federal Government Never Ceded Its Rights to Any State, i. e. Indian Lands

The court then discussed the cases of *C. O. & G. Ry. Co.* v. *Harrison*, 235 U. S. 259; *Oklahoma* v. *Barnsdall*, 296 U. S. 521, and held that because the State had no "residuum of authority", that the State could not collect a Severance Tax. The Assignment of Errors (R. 38), and the Statement of Points (R. 41) of the cross appellant herein questions that ruling, for the reason that according to the Federal Law, i. e. U. S. C. A. Title 16, Par. 480, the the states do have "residuum of legislative authority". That, therefore, the Arkansas Supreme Court erred in so holding.

We do not deem it necessary to go further into the decision of our courts to the effect that Wilson and Company are not instrumentalities of the Federal Government and that they may be made subject to a tax by the State of Arkansas without interference with the United States Government in its forest program and it being so well established that the Federal Government is not subject to taxation by a state we do not offer any additional decisions.

In accordance with the provisions of the Arkansas Severance Tax Law (Section 1, Acts of Arkansas, No. 158 of the Acts of 1937) on moneys collected from severance taxes is used for the purpose of development of the forests of Arkansas, the same work in which the Federal Government is engaged. Since the Federal Government is in no way affected by the operation of the Arkansas Severance Tax Law, the Arkansas law cannot be said to violate the Federal Forestry Act. The Arkansas law, therefore, can in no way conflict with either provision of the Constitution of the United States as referred to in plaintiff's complaint.

Finally, we conclude with the suggestion if the State of Arkansas has a "residuum of legislative authority", as held by the decision of the Supreme Court of Arkansas herein in the lands "acquired by the United States under the Act of Congress of March 1, 1911 (U. S. C. A., Title 16, Section 516)" then we see no good reason why the state would not also have a "residuum of legislative authority" in the lands which it had never ceded to the states but under which lands the states are granted all civil and criminal rights as to jurisdiction of its courts (U. S. C. A., Title 16, paragraph 480) and when timbers therefrom are severed by private individuals for commer-

cial purposes, as was done by Wilson and Company in the instant case, the collection of the tax by the State of Arkansas could not be said to interfere with the Government's control, nor be a burden upon the United States Government, but is simply a tax upon the products severed from the soil by private concerns for commercial purposes.

If such contention of the Commissioner of Revenues of Arkansas is not the co rect contention, we cannot understand how the Commissioner would be legally justified in collecting sales tax or gross receipts tax on merchandise and materials for the United States Government in the war program and income tax from the income of such contractors. The collection of such taxes cannot and do not interfere with the United States Government and such is not a tax upon the United States Government as declared by this court in many cases in recent months. The appellee, therefore, submits that the Judgment of the Supreme Court of Arkansas wherein it sustains the Arkansas Commissioner of Revenues in collecting severance tax from the appellant on lands which had been ceded to the United States Government under the Acts of Congress of March 1, 1911 (U. S. C. A., Title 16, Section 516), should be sustained, and that its denial of the right to collect such tax from the severance of timber from the lands under which this state is granted all necessary criminal and civil jurisdiction under the provisions of U. S. C. A., Title 16, paragraph 480.

Respectfully submitted,

R. S. Wilson

O. T. Ward

Solicitors for Appellee on Appeal and Petitioner on Writ of Certiorari

APPENDIX

28 U. S. C. A.

Paragraph 344. (*Judicial Code, section* 237, *amended.*) *Appellate jurisdiction of decrees of State courts, certiorari.* (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition of certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: Provided, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court

to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title. (R. S. Paragraphs 690, 709; Mar. 3, 1911, c. 231, paragraphs 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, paragraph 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, paragraph 1, 43 Stat. 937).

U. S. C. A. Title 16, *Paragraphs* 471, 516

Paragraph 471. National forests; establishment; limitation on additions in certain States; lands suitable for production of timber.

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

(a) No national forest shall be created, nor shall any additions be made to one created prior to June 25, 1910, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

(b) The President, in his discretion, is authorized to establish as national forests or parts thereof, any lands within the boundaries of Government reservations, other than national parks, reservations for phosphate and other mineral deposits, or water-power purposes, national monuments and Indian reservations, which in the opinion of

the Secretary of the department now administering the area and the Secretary of Agriculture are suitable for the production of timber, to be administered by the Secretary of Agriculture under such rules and regulations and in accordance with such general plans as may be jointly approved by the Secretary of Agriculture and the Secretary formerly administering the area, for the use and occupation of such lands and for the sale of products therefrom. Any person who shall violate any rule or regulation promulgated under this subdivision shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisoned for not more than one year, or both. (March 3, 1891, c. 561, paragraph 24, 26 Stat. 1103; March 4, 1907, c. 290, 34 Stat. 1271; June 25, 1910, c. 421, paragraph 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497; June 7, 1924, c. 348, paragraph 9, 43 Stat. 655).

Paragraph 480. The jurisdiction, both civil and criminal, over persons in national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

Paragraph 516. *Purchase of lands approved by commission; consent of State; exchange of lands; cutting and removing timber*

The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have

been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. With the approval of the National Forest Reservation Commission as provided by this section and sections 515 of this title, and when the public interests will be benefitted thereby, the Secretary of Agriculture is authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests acquired under said sections which, in his opinion, are chiefly valuable for the purposes as therein stated, and in exchange therefor to convey by deed not to exceed an equal value of such national forest land in the same State, or he may authorize the grantor to cut and remove an equal value of timber within such national forests in the same State, the values in each case to be determined by him. Before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in such exchange. Timber given in such exchanges shall be cut and removed under the laws and regulations relating to such national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands so

accepted by the Secretary of Agriculture shall, upon acceptance, become parts of the national forests within whose exterior boundaries they are located, and be subject to all the provisions of sections 480, 500, 513-519 and 521 of this title. (March 1, 1911, c. 186, paragraph 7, 36 Stat. 962; March 3, 1925, c. 473, 43 Stat. 1215).

Acts of Arkansas, No. 158, *Year* 1937, *P.* 581, *Sec.* 1

Section 1. After the passage of this Act all severance tax collected on timber under existing provisions of law shall, upon payment into the State Treasury, be credited to the "State Forestry Fund" to be used by the State Forestry Commission for the development of the forests of the State.

INDEX

CITATIONS

677336—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 328

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY, APPELLANTS

v.

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

No. 329

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, PETITIONER

v.

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY

ON APPEAL FROM AND ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 8, 1945, in both of these cases the Court invited the Solicitor General to file a brief

as *amicus curiae*. (R. 42.) In No. 328 the Court requested counsel, without restricting their argument in any other respect, to address themselves in their briefs and on oral argument to four questions which relate to the record made below and the assignments of errors in this Court, and whether the constitutional objection to the tax in question has been preserved so as to be presented to this Court. (R. 42.) We believe that in this case those questions can best be developed by the parties and we wish to express no opinion upon them. Passing those questions, we assume that the Court has jurisdiction to decide the cases on their merits, and we desire to express our views on the issues inherent in the record. These may be stated as follows:

1. Whether the taxing statute is repugnant to the Constitution and laws of the United States in so far as it requires the severer of timber to collect the tax from the United States, or imposes a lien upon property of the United States.

2. Whether the portion of the national forest established by reservation of forest lands from the public domain is an area over which the United States has exclusive jurisdiction so as to exclude the operation of the taxing statute within its boundaries.

3. Whether the portion of the national forest established on land acquired by the United States is an area over which the United States has such jurisdiction.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 22–27.

SUMMARY OF ARGUMENT

I

1. The Arkansas severance tax statute is unconstitutional so far as it taxes the United States. The statute requires payment of the tax in the first instance from the person actually engaged in the operation of severing timber from the soil, but, in general terms and without excepting the United States, the statute requires the severer to collect or withhold the amount of the tax from the price paid to the owner of the timber at the time of severance. If the statute left the severer ultimately liable for the tax, the tax would not be objectionable for it is now well settled that a contractor with the United States does not share its sovereign immunity, and a state tax is not violative of federal supremacy unless by legal incidence the tax is upon the sovereign itself, its property or activities. But established principles preclude the states, without the consent of Congress, from exacting taxes from the United States. A statute which imposes the ultimate liability for a tax upon the United States where Congress has not subjected the federal activity to state taxation is as invalid as a statute exacting the tax from the United States directly.

The statute is unconstitutional so far as it purports to impose a lien upon federal property. By the contract here involved, the United States retains title to severed timber until paid for, scaled, measured or counted. The state cannot constitutionally impose a lien, without the consent of Congress, upon this or any other federal property.

2. However, it is wholly possible that the Supreme Court of Arkansas might construe the foregoing provisions (withholding, lien, etc.) as inapplicable when the United States is the owner, thus leaving a valid tax against the severer. Alternatively, it might construe the state statute as separable, so that even if the foregoing provisions were otherwise applicable and unconstitutional, a valid tax would remain against the severer. Whether the Arkansas court would place such interpretations upon the statute is conjectural and we express no opinion on the matter.

II

The severance tax is not objectionable on the ground that the United States has exclusive legislative jurisdiction over any part of the national forest. Such jurisdiction can be acquired by the United States in either of two ways: Through a cession of jurisdiction to the United States by the state, or by the federal purchase of lands within a state and with its consent for needful buildings pursuant to Article I, Section 8, Clause 17 of the

Constitution. Whichever method is involved, the United States may accept or decline the grant, and acceptance will not be presumed where Congress has shown its disinclination to receive exclusive legislative powers over the area in question.

1. So far as any area now in the national forest was originally part of the public lands of the United States, the legislative authority of Arkansas extended over that area upon the admission of Arkansas to statehood, subject only to the provision that the state could not enact laws in conflict with the exercise of the powers granted to the Federal Government by the Constitution. Since these lands were always owned by the United States and were never purchased by it, the constitutional provision in Article I, Section 8, Clause 17 can never have come into operation to divest the state's authority. The state has not ceded legislative authority to the United States, and there is no defect in the state's authority to tax transactions otherwise within its reach in such areas.

2. As to lands which were purchased by the United States for inclusion in the national forest, such purchases were made with the statutory consent of Arkansas. The statute giving consent reserves only the right of the state in civil matters to execute its process, and the court below erred in holding that this reservation preserved the state's power to tax. Other reasons, however,

preclude the divestment of the state's jurisdiction. Apart from the question whether the purchases were for "needful buildings" within Article I, Section 8, Clause 17 of the Constitution, exclusive legislative jurisdiction did not follow, because Congress has expressly provided that the legislative jurisdiction of the state should not be changed by reason of the Government's acquisition of lands for national forests. The power of Congress to refuse exclusive jurisdiction is undoubted.

ARGUMENT

I

THE ARKANSAS SEVERANCE TAX STATUTE IS UNCONSTITUTIONAL SO FAR AS IT TAXES THE UNITED STATES OR SUBJECTS FEDERAL PROPERTY TO ITS LIEN

1. The Arkansas severance tax statute, Digest of the Statutes of Arkansas (Pope, 1937), Secs. 13371–13395, has several provisions which are unconstitutional if the statute is applied according to its terms and without excepting the United States or its property. The statute is invalid, first, if through its withholding provisions it taxes the United States. Further, the tax lien which the statute purports to impose upon the severed resources and the machinery, tools, and equipment is unconstitutional as applied to resources or equipment owned by the United States. These propositions can readily be established and we will discuss them in turn. The appropriate dis-

position of the case, however, turns ultimately upon the meaning of the taxing statute and whether state law purports to accomplish these unconstitutional objectives. Owing to the failure of the court below to express itself on these questions, whether because they were not urged below or because, though urged, the court saw fit not to discuss them, the meaning and effect of the severance tax statute in relation to the United States is not as clear as it has been in some other cases involving similar issues (e. g., *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95).

The taxing statute is invalid, we submit, if it taxes the United States. The court below held that the immunity of the United States from state and local taxation does not inure to a person, firm or corporation merely because such claimant has a contract with or a grant from the Federal Government. The proposition thus stated is now unexceptionable. *Alabama* v. *King & Boozer*, 314 U. S. 1; *James* v. *Dravo Contracting Co.*, 302 U. S. 134. Cf. *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 269. But that proposition does not demonstrate the validity of the tax, for the immunity of the United States itself from state and local taxation is long established in history and has not been doubted. *United States* v. *Allegheny County*, 322 U. S. 174. Where governmental action is carried on by the United States itself, and Congress does not affirmatively declare

that its activities shall be subject to taxation, its inherent freedom from taxation continues. Cf. *Mayo* v. *United States,* 319 U. S. 441, 447–448. The opinion below fails to discuss the question whether the statute requires collection of the tax from the United States and so unconstitutionally makes the taxpayer the United States itself.

The severance tax is upon the privilege of severing timber from the soil for sale or commercial purposes. Digest of the Statutes of Arkansas, Sec. 13371 (Appendix, *infra*); *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473; *McLeod* v. *Kansas City Southern Railway Co.,* 206 Ark. 281. The necessary reports and the payment of the tax itself are required of the "severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor." Digest of the Statutes of Arkansas, Sec. 13382. (Appendix, *infra.*) The United States is not the severer. If the statute left the ultimate liability with the severer, the tax would be a valid one even though economic forces might compel the severer to charge the tax back to the United States in the form of a lower price for timber removed. We see no difference in this respect between a tax the legal incidence of which is upon a vendee of the United States, and a tax or state regulation the legal incidence of which is upon a vendor to the United States, such as were upheld by this Court in *Alabama* v. *King &*

Boozer, supra, and *Penn Dairies* v. *Milk Control Comm'n, supra.* But the fact that the severer or producer must pay the tax in the first instance does not establish the validity of the tax. Unless Congress has spoken to put aside the immunity which otherwise surrounds the activities of the Federal Government, the question remains whether the statute makes the United States ultimately liable for the tax as original owner of the timber. "The taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95.

If the person who must pay the tax in the first instance is compelled by the taxing statute to collect an equivalent amount from the sovereign or from one of its immune instrumentalities, the tax is upon the sovereign itself. The sales tax in *Federal Land Bank* v. *Bismarck Co., supra,* was held invalid for that reason. The tax there was sought to be imposed upon the purchase of materials by a federal land bank, an agency of the United States whose purchases were immunized by Congress from state and local taxation. The taxing statute required the tax to be collected by the state from the retailer, but the retailer was required to add the tax to the sales price, and the statute declared the tax to be a valid debt from the purchaser to the retailer. The state court had held in other cases and in the case of the Federal Land

Bank itself that the incidence of the tax was upon the purchaser, and this Court held that determination to be controlling. Similarly, the Court's opinion in *Alabama* v. *King & Boozer, supra,* necessarily assumes the same point. The statute there also required the seller to collect the tax from the purchaser, and the Government asserted that it was the purchaser, and that the tax was therefore invalid. The Court held that the "soundness of this conclusion turns on the terms of the contract" (314 U. S. at p. 9) and concluded that the United States was not the purchaser and that the tax, therefore, was valid. Finally, as this Court held in *United States* v. *Allegheny County,* 322 U. S. at p. 189, "State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one."

The statute here, in terms of general application and without excepting the United States, appears to tax the owner of the land and timber at the time of severance. Section 13382 of the taxing statute, *supra,* provides:

> The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

The statute is plain that the tax is "due by the respective owners of such natural resources."

Moreover, in providing that the reporting taxpayer shall withhold, the statute gives the severer, purchasing timber from the landowner, a plain defense to an action by the owner to recover the full contract price for the timber removed; and in providing that the reporting taxpayer shall collect, the statute gives the severer an action against the owner for the amount of the tax, just as plainly as though it provided that the amount of the tax should be recoverable at law in the same manner as other debts. The same intent is shown by the fourth paragraph of the same section, empowering and requiring the severer operating under a royalty contract "to deduct from any such royalty or other interest the amount of the severance tax herein levied" before making payment to the owner. Failure to comply with any of the provisions of Section 13382 is a misdemeanor punishable by fine.

We submit that if the taxing statute is applicable to the United States as owner of the timber lands, the statute places the ultimate liability for the tax upon the sovereign, and so far as it does so, the statute is invalid. There is no question here that the activity of selling the timber from federally-owned forests is one in which the Federal Government may constitutionally indulge. The Congressional program of preservation of forest lands, the cultivation of timber, and the systematic cutting and sale of

timber so as to maintain a constant supply of new growth is at least a half-century old. Act of March 3, 1891, c. 561, 26 Stat. 1095, Sec. 24; Act of June 4, 1897, c. 2, 30 Stat. 11, 34–36. The program is a valid exercise of the power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Constitution, Article IV, Section 3, Clause 2. *Light* v. *United States,* 220 U. S. 523; *United States* v. *Grimaud,* 220 U. S. 506; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389; *Hunt* v. *United States,* 278 U. S. 96.

The taxing statute is invalid, moreover, so far as it imposes a lien upon property owned by the United States. Section 13376 of the statute (Appendix, *infra*) places a lien upon any and all natural resources severed, and upon the machinery, tools and implements used in severance. Under the timber sale contract here the title to all timber included in the agreement remains in the United States until it has been paid for, scaled, measured or counted. (R. 10.) It goes almost without saying that the statute cannot validly subject the property of the United States to a lien. The constitutional power of Congress to dispose of and make all needful rules and regulations respecting the property of the United States necessarily excludes any such operation of the state law. *Wisconsin Railroad Co.* v. *Price*

County, 133 U. S. 496; *United States* v. *Rickert*, 188 U. S. 432, 439; *New Brunswick* v. *United States*, 276 U. S. 547.

2. The foregoing discussion is based upon the assumption that the Arkansas statute actually taxes the United States—that the severer is required to withhold the amount of the tax from the United States, that he is given recourse against the United States, and that a lien attaches to property of the United States. However, if the state statute were to be construed so as not to bring these provisions into play against the Government, it is probable that the tax would be valid as applied to the severer alone. Although the state legislation seems all inclusive on its face, making no explicit exception for the United States, it is wholly possible that the Supreme Court of Arkansas might rule that it is inapplicable to the United States, and that when the owner is the United States, the tax applies only to the severer, without liens against property of the United States, etc. Or, conceivably, even if those provisions were construed to apply to the United States and even if they were held to be unconstitutional, the Supreme Court of Arkansas might still hold that the state statute is separable and that a valid tax remains against the severer. Whether the Arkansas court would place such interpretations upon the statute is conjectural and we do not express any opinion on the matter.

II

THE NATIONAL FOREST IS NOT AN AREA OVER WHICH THE UNITED STATES HAS EXCLUSIVE JURISDICTION

The United States has broad powers of regulation within the area embraced by the national forest. It does so by virtue of its powers to hold and protect its own property and dispose of its property as it sees fit. *Light* v. *United States, supra,* 220 U. S. 523; *Utah Power & Light Co.* v. *United States, supra,* 243 U. S. 389; *Hunt* v. *United States, supra,* 278 U. S. 96. As we have shown, the Arkansas severance tax statute is unconstitutional to the extent that it interferes directly with those powers. But we think that the state has legislative jurisdiction within the national forest except insofar as the state's enactments may conflict with the exercise of constitutional powers by Congress. In holding that the United States has exclusive legislative jurisdiction over the part of the national forest created by the reservation of lands from the public domain, we think that the court below is in error.

The United States may obtain the exclusive power of legislation over territory within a state in either of two ways: Through a cession by the state to the United States of exclusive jurisdiction, or by the purchase of lands within a state and with its consent for needful buildings pursuant to Article I, Section 8, Clause 17 of the Con-

stitution.[1] *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525. Whichever method of transferring jurisdiction is involved, acceptance of exclusive jurisdiction by the United States is necessary; the grant may be accepted or declined. *Mason Co.* v. *Tax Comm'n*, 302 U. S. 186; *Atkinson* v. *Tax Comm'n*, 303 U. S. 20. With respect to land acquisitions by the United States prior to February 1, 1940,[2] acceptance on the part of the United States could be presumed, at least where such jurisdiction was not evidently prejudicial to the United States, but it will not be presumed where Congress has shown its intention that legislative jurisdiction should not vest. *Mason Co.* v. *Tax Comm'n, supra.*

[1] That provision reads as follows:

> Section 8. The Congress shall have power . . .
>
> * * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—

[2] The Act of February 1, 1940, c. 18, 54 Stat. 19, amending Revised Statutes, Sec. 355, provides that exclusive jurisdiction shall be presumed not to have been accepted unless the head of the interested federal agency or department files a notice of acceptance with the governor of the state in which the lands are situated. See *Adams* v. *United States*, 319 U. S. 312.

In the instant case the state has not ceded exclusive jurisdiction to the United States, and in so far as the state has consented to the acquisition by the United States of lands to be incorporated in the national forest, the United States has not accepted exclusive jurisdiction.

1. *Lands reserved from the public domain.*— Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states (Act of June 15, 1836, c. 100, 5 Stat. 50) the legislative authority of Arkansas extended over the federally-owned lands within the state to the same extent as over similar property held by private parties, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. *Fort Leavenworth R. R. Co.* v. *Lowe, supra; Utah Power & Light Co.* v. *United States, supra.* With respect to such lands as were at that time owned by the United States and which may later have been incorporated in the national forest, exclusive jurisdiction did not pass to the United States by virtue of the provisions of Article I, Section 8, Clause 17 of the Constitution, for there was no "purchase" of such lands by the United States with the "consent" of the state. The United States, therefore, did not acquire exclusive jurisdiction unless it has been ceded by the state in some other way. *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* pp. 530–531.

We think that exclusive legislative jurisdiction has not been ceded by Arkansas. The Arkansas legislature has given its consent to the purchase of lands by the United States in Arkansas for the erection of public buildings (Digest of the Statutes of Arkansas, Sec. 5644, Appendix, *infra*) and to some acquisitions for national forests. (Id., Sec. 5646, Appendix, *infra.*) But the legislature has not enacted a statute ceding to the United States such legislative jurisdiction as would exclude the power of the state to tax those transactions within the national forest which the state taxing power may otherwise competently reach. The state has purported to confer some limited legislative powers upon Congress in Section 5647, Appendix, *infra,* but that section falls far short of ceding exclusive jurisdiction. It does nothing more than to recognize the power of Congress to administer and protect federal property, and that power owes its existence to no statutory transfer by a state. The court below erred in holding that the state lacks jurisdiction to exercise its taxing power over lands placed in the national forest by reservation from the public domain.

2. *Lands acquired by the United States.*—The question remains whether those lands which were brought into the national forest by acquisition by the United States were purchased for needful buildings with the consent of the state, so as to give the United States exclusive jurisdiction under

Article I, Section 8, Clause 17. We think that they were not.

(a) On this portion of the case the court below rested its decision on its view of the consent statute, Digest of the Statutes of Arkansas, Sec. 5646, and held that the consent under that statute was qualified and reserved taxing jurisdiction to the state. The question whether the state has yielded or reserved taxing jurisdiction under that statute is a federal question upon which the state court's interpretation is not conclusive. *Mason Co.* v. *Tax Comm'n, supra,* 302 U. S. 186, 197. The court below compared the statute with the West Virginia statute involved in *James* v. *Dravo Contracting Co., supra,* 302 U. S. 134. We think that the statutes are not similar. The consent statute in the *Dravo* case reserved the right to execute process within the limits of the land acquired by the United States, "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition." The jurisdiction ceded was "Concurrent jurisdiction with this State"—that provision was a late addition to the statute, and the additional reservation which was attached to the right to serve process was added at the same time, so as to make the reservation more comprehensive. The reservation to the consent statute here is neither so broad nor does it have similar history.

Section 5646, Digest of the Statutes of Arkansas, reserves to Arkansas a "concurrent" jurisdiction—

> * * * so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this Act had not been passed.

With respect to civil matters, at least, the jurisdiction reserved is "concurrent" only so far that the state may serve process in civil cases. The reservation of the right to serve process has always been regarded as a reservation not inconsistent with the transfer of a jurisdiction otherwise exclusive. Its purpose is to prevent the federal area from being a sanctuary for fugitives from justice (see *James* v. *Dravo Contracting Co., supra,* p. 147; *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* p. 533) and its intent is fulfilled by the accomplishment of that purpose. True, the state may give a partial or qualified consent to purchases by the United States, and in such cases the jurisdiction transferred is limited according to the consent given. *James* v. *Dravo Contracting Co., supra; Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99. But from the proposition that a state may qualify its consent, it does not follow that the jurisdiction of the United States is limited where the state has not so qualified its consent.

The reservation of the right to serve process in all civil cases does not imply that the state shall have legislative jurisdiction in civil matters over the area purchased by the United States. *Bowen* v. *Johnston*, 306 U. S. 19, 29. With respect to criminal matters the statute reserves the right to serve process against any person charged with a crime committed "without or within said jurisdiction." This peculiar language may imply that the state's legislative jurisdiction in criminal matters is to continue over the federally-owned land. That question is not involved here, except that the language of the statute in regard to criminal process is different from the language in regard to civil process, and if the state intended that its criminal laws and its civil laws both should continue in force over the federally-owned land, it would doubtless have used the same language to qualify its consent for both purposes.

(b) Although we disagree with the analysis of the court below on the meaning and scope of the state's consent statute, we nevertheless agree that the United States did not acquire exclusive jurisdiction. Passing the question whether the lands were acquired by the United States for "needful buildings" within the meaning of Article I, Section 8, Clause 17 (cf. *James* v. *Dravo Contracting Co.*, 302 U. S. at 142–143; *Mason Co.* v. *Tax Comm'n.*, 302 U. S. at 203), Congress has shown its intention not to accept exclusive jurisdiction.

The Act of March 1, 1911, c. 186, 36 Stat. 961,

Section 7 of which authorizes the Secretary of Agriculture to purchase lands for national forests, provides in Section 12 (both Appendix, *infra*) that the civil and criminal jurisdiction over persons or lands acquired under the Act shall not be changed by their reservation as forest lands, and that the inhabitants of a state shall not, by reason of the existence of a national forest, "be absolved from their duties as citizens of the State." See also the Act of June 4, 1897, c. 2, 30 Stat. 11, 36. The court below erred in holding that these statutes do not permit state taxation.

CONCLUSION

The Arkansas severance tax statute, if applied to require withholding of the tax as against the United States or to impose a lien upon federal property, is unconstitutional. The tax is not objectionable, as the court below held, on the ground that the state lacks taxing jurisdiction over any part of the territory in the national forest, with respect to transactions otherwise within the state's reach.

Respectfully submitted.

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DECEMBER, 1945.

APPENDIX

Act of June 4, 1897; c. 2, 30 Stat. 11, 35:

* * * * *

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom

shall be accounted for b the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

* * * * *

(16 U. S. C. 1940 ed., Sec. 476.)

Act of March 1, 1911, c. 186, 36 Stat. 961:

SEC. 7. That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: *Provided,* That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. (16 U. S. C. 1940 ed., Sec. 516.)

SEC. 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses

against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State. (16 U. S. C. 1940 ed., Sec. 480.)

Digest of the Statutes of Arkansas (Pope, 1937):

§ 5644. *Consents to any purchase by United States.* The State of Arkansas hereby consents to the purchase to be made or heretofore made, by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, lock, dam, fish hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this State, within and over all grounds thus purchased by the United States, within the limits of this State, is hereby ceded to the United States. Provided, that this grant of jurisdiction shall not prevent execution of any process of this State, civil or criminal, upon any person who may be on said premises. Act April 29, 1903, p. 346, § 1.

§ 5646. *Forest lands.* The consent of the State of Arkansas be and is hereby given to the acquisition by the United States, by purchase, or otherwise with adequate compensation, of such land in Arkansas as in the opinion of the Federal Government may be needed for the establishment, consolidation and extension of National Forests in the State, for the purpose of the Act of Congress entitled "An Act to Enable any State to cooperate with any other State or States, or with the United

States, for the protection of the Watershed of Navigable Streams and to Appoint a Commission for the Acquisition of Lands for the Purpose of Conserving the Navigability of Navigable Rivers," approved March 1st, 1911, (36 Statute, 961), and acts supplementary thereto and amendatory thereof; provided, that this Section applies only in those counties where the United States now owns land comprising National Forests and in Counties adjoining the aforesaid Counties; further provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed [sic] thereon in like manner as if this Act had not been passed.

§ 5647. *Jurisdiction.* Power is hereby conferred upon the Congress of the United States to pass laws and to make or provide for the making of such rules and regulations of both a civil and criminal nature, and provide punishment therefor, as in its judgment may be necessary for the administration, control and protection of such lands as have been acquired or may hereafter be acquired under the provisions of this act. Id. § 2.

§ 13371. *Tax levied.* There is hereby levied a privilege or license tax, to be known as "the Severance Tax," for the year 1923 and for each subsequent year, upon each person, firm, corporation or association of persons, hereinafter called "the producer,"

engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds, and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine and all other forest products and all other natural products of the soil or water of Arkansas. Section 1, Act 118 of 1923.

§ 13375. *Tax on bauxite; coal; timber.*

* * * * *

(c) On Timber. Every producer of timber shall be subject to all the the [sic] provisions of this Act, except that instead of a tax of two and one-half (2½%) per cent of the gross market value of said products, the producer of timber shall pay a privilege tax equivalent to seven cents (7¢) per thousand feet board measure on the total stumpage severed or cut during the preceding month, irrespective of the market value thereof. Provided that no tax herein levied shall apply to the producer of switch ties who hews out or makes such ties entirely by hand. Ib. § 5 as amended by Act 116 of 1933. Sec. 1.

§ 13376. *Lien on resources for tax.* The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources. Act 118 of 1923, Sec. 6, as amended by Act 283 of 1929. Sec. 4.

§ 13382. *Who liable for tax.* Except as otherwise in this Section provided, the mak-

ing of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor.

The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

And in the case of oil and gas, such production as shall be sold or delivered to any pipe line company and transported by it through pipes connected with the oil or gas well of the owner shall notwithstanding such sale or delivery be liable for the tax herein levied.

Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment.

Any person, firm, corporation or association failing or refusing to comply with any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00), for each offense. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES.

Nos. 328 and 329.—October Term, 1945.

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellants,	
328 *vs.*	
Otho A. Cook, Commissioner of Revenues for the State of Arkansas.	Appeal from and Writ of Certiorari to the Supreme Court of Arkansas.
Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner,	
329 *vs.*	
Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company.	

[March 4, 1946.]

Mr. Chief Justice Stone delivered the opinion of the Court.

An Arkansas statute, Act 118 of 1923, Pope's Digest, Arkansas Statutes (1937), § 13371, imposes "a privilege or license tax . . . upon each person . . . engaged in the business of . . . severing from the soil . . . for commercial purposes natural resources, including . . . timber." By § 13372, as a condition of the license, there is imposed on the severer an obligation to pay the tax and consent that the tax "shall . . . remain a lien on each unit of production until paid into the State Treasury." Section 13375 fixes the tax at 7 cents per thousand feet of the timber severed. Section 13376 provides that the state "shall have a lien upon any and all natural resources severed from the soil". In § 13382 it is provided that "the payment of said privilege taxes shall be required of the severer . . . actually engaged in the operation of severing natural products, whether as owner, lessee, concessionaire or contractor. . . . The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance."

Appellants in No. 328, a copartnership, entered into contracts with the United States for the purchase and severance of timber on national forest reserves located within the state, some of which were public lands of the United States when Arkansas was admitted to statehood and some of which were acquired by the United States by purchase with the consent of the state. The contracts of severance and purchase provided that "title to all timber included in this agreement shall remain in the United States until it is paid for, and scaled, measured or counted." By the contracts the appellants were required in advance of severance to place with the Government representative advance installments of the estimated purchase price.

In the years 1937 to 1942, appellants, proceeding under their contract, severed timber from the forest reserves in question. An execution having been issued and delivered to the county sheriff, appellee in No. 328, and also appellant in No. 329, for collection of the tax assessed against appellants in No. 328 for the years in question, they brought the present suit in the state chancery court to enjoin the collection. The questions on which the parties ask decision are (a) whether the forest reserves which were public lands of the United States before Arkansas was admitted to statehood are subject to the taxing jurisdiction of the state; (b) whether the forest reserves acquired by the United States by purchase remain subject to the taxing authority of the state; and (c) whether the tax is unconstitutional as a tax laid upon the property or activities of the United States, or because the tax laid on plaintiffs imposed an unconstitutional burden on the United States.

The chancery court gave judgment for plaintiffs enjoining collection of the tax. It held that if the tax "be applied" to plaintiffs, it "would be a tax upon the operations of the Government of the United States", and that the tax "does not apply to timber severed by the plaintiffs from the National Forest." On appeal the Supreme Court of Arkansas modified the judgment, holding that the state was without authority to lay a tax on the severance of timber from lands which were public lands of the United States when Arkansas was admitted to statehood; that the authority of the state to lay the tax extended to transactions occurring on the forest reserve acquired by the United States by purchase; and that the present tax assessed against plaintiffs for the severance of timber on forest reserves of this class did not lay an unconstitutional burden on the United States. — Ark. —, —.

Plaintiffs have appealed, in No. 328, from so much of the judgment as sustained the tax with respect to lands acquired by the United States by purchase, urging in their assignments of error that the Supreme Court of Arkansas erred in reversing the judgment of the chancery court, "which held to be void the severance tax statute", and in holding that the severance tax law is not repugnant to the supremacy clause, Art. VI, cl. 2 of the Constitution, or to Art. IV, § 3, cl. 2, conferring on Congress power to dispose of "and make all needful Rules and Regulations respecting . . . Property belonging to the United States." Defendant, appellant in No. 329, seeks by his appeal to reverse so much of the judgment as denied the right to levy the tax for severance of timber from forest lands reserved from the public domain. On submission of the jurisdictional statements in this Court we postponed to the hearing on the merits consideration of our jurisdiction in No. 328. In No. 329 we dismissed the appeal for want of jurisdiction. § 237(a) of the Judicial Code as amended, 28 U. S. C. § 344(a). Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by § 237(a) of the Judicial Code as amended, we granted certiorari.

Under § 237 of the Judicial Code we are without jurisdiction of the appeal in No. 328, unless there was "drawn in question" before the Supreme Court of Arkansas "the validity of a statute" of the state, "on the ground of its being repugnant to the Constitution, . . . or laws of the United States." The purpose of this requirement is to restrict our mandatory jurisdiction on appeal, *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651, and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, *Charleston Ass'n* v. *Alderson*, 324 U. S. 182, 185-6 and cases cited, or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. *Fiske* v. *Kansas*, 274 U. S. 380, 385 and cases cited. This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, *Wall* v. *Chesapeake & Ohio R. Co.*, 256 U. S. 125, 126; *Citizens Nat'l Bank* v. *Durr*, 257 U. S. 99, 106, or has in fact been decided by it, *Nickey* v. *Mississippi*, 292 U. S. 393, 394; *Whitfield* v. *Ohio*, 297 U. S. 431, 435-6, and that its decision was necessary to the judgment. *Cuyahoga Power*

Co. v. *Northern Realty Co.*, 244 U. S. 300, 304 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. The bill of complaint in the chancery court set up only that the demand of the state for the tax "is an illegal and void exaction" and "is in violation of" Art. IV, § 3, cl. 2 and of Art. VI, cl. 2 of the Constitution. There were no assignments of error in the Supreme Court of Arkansas.

As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States. *Charleston Assn* v. *Alderson*, *supra*, 185-6 and cases cited. That court's opinion, while holding that the "tax law" was applicable to "persons severing timber from lands of the United States in the national forest", does not indicate that plaintiffs raised there, or that the court passed upon, the validity of the statute as applied. The court considered only the validity of "the tax", not that of the statute.

With reference to plaintiffs' liability for the tax it decided only that the state "has the right to collect the severance tax, so far as territorial jurisdiction is concerned", for severance of timber from lands acquired by the United States by purchase, and that plaintiffs could not claim the benefits of the immunity, if any, of the Federal Government from "the tax", since it was imposed on plaintiffs, not the Government or its property. It said that the Government was not constitutionally immune from such economic burden as might be passed on from the taxpayer to the Government by reason of the effect of the tax paid by the severers, citing *James* v. *Dravo Contracting Co.*, 302 U. S. 134 and *Alabama* v. *King & Boozer*, 314 U. S. 1. Being asked to enjoin the collection of the tax, the state court contented itself with holding that the tax, which was assessed on plaintiffs and not the Government, imposed no burden on the Government which infringed its implied constitutional tax immunity. Since the collection of a tax by a state officer, as here, may or may not offend against the Constitution, independently of the constitutionality of a statute, see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369, the state court, in holding the tax consti-

tutional, did not necessarily pass on the constitutional validity of the statute.

In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or "the right to collect the tax" which has been levied, or to show that the validity of the tax alone has been considered. *Charleston Assn.* v. *Alderson*, *supra*, 185, and cases cited. For "the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1, 6. It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, *Jett Bros. Co.* v. *City of Carrollton*, *supra*; *Miller* v. *Board of County Comm'rs*, 290 U. S. 586; *Memphis Gas Co.* v. *Beeler*, *supra*, 650; *Commercial Credit* v. *O'Brien*, 323 U. S. 665; *Charleston Assn.* v. *Alderson*, *supra*, 185, or, as here, upon a "tax", *Citizens Nat'l Bank* v. *Durr*, *supra*, 306; *Indian Territory Illuminating Co.* v. *Board of County Comm'rs*, 287 U. S. 573; *Baltimore Nat'l Bank* v. *State Tax Comm'n*, 296 U. S. 538; *Irvine* v. *Spaeth*, 314 U. S. 575, or upon the attempt to collect a tax, *Jett Bros. Co.* v. *City of Carrollton*, *supra*.

Since plaintiffs' attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under § 237 of the Judicial Code. Treating the appeal as a petition for writ of certiorari, as required by § 237(c) of the Judicial Code, we grant certiorari, as we did in No. 329. We can consider only the federal questions passed upon by the state Supreme Court.

Our decision in *James* v. *Dravo Contracting Co.*, *supra*, and in *Alabama* v. *King & Boozer*, *supra*, and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

Plaintiffs now, for the first time, assail the tax and the statute imposing it, on the ground that the Act requires the severer to collect the tax from the owner of the timber at the time of severance, Pope's Digest, § 13382, and gives to the state a lien on the

land from which the lumber is severed, *id.*, § 13374, and a lien upon the severed timber, *id.*, § 13376, even though title to the severed product has not passed to the taxpayer. They contend that the Act thus purports to place a forbidden tax directly on the United States. Cf. *Mayo* v. *United States*, 319 U. S. 441.

But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely "an enlargement" of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey* v. *Des Moines*, 173 U. S. 193, 197, 198. We are therefore not free to consider it.

"In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317, and cases cited. For, as we said in *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434-435, "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." See also *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Bolln* v. *Nebraska*, 176 U. S. 83, 89-92; *New York* v. *Kleinert*, 268 U. S. 646, 650-1; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-8.

In view of the lien provisions of the statute and its provisions which purport to authorize the taxpayer to collect the tax from the owner of the severed timber, here the Government, it is suggested that we cannot rightly adjudge that the state is entitled to recover the tax on the transactions of severance involved, without determining the applicability of these provisions to the Government and their validity if so applied. We are not now concerned with the Government's liability to the statutory lien or for payment of the tax. It will be time enough to consider its interests when some effort is made to enforce the lien or collect the tax from the United States. We obviously do not by our judgment against the plaintiffs impose the tax on the Government. Their property alone is subject to the lien of the present judgment and to execution issued under it. They cannot recover the amount of the judgment from the Government unless the Constitution permits. And if it forbids they obviously will not collect the tax. In neither case does our judgment impose any burden on the United States. We are not called on to determine whether plaintiffs could have successfully contested their liability in the state courts or here, if the contentions were properly raised, upon the ground that they would be unable to collect the tax from the Government, either because the provision purporting to allow such collection is inapplicable where the owner is the Government or, if applicable, invalid, or on the ground that the tax, applied to them without recourse against the Government, would deny to them the equal protection of the laws.

The state, construing its own law, has rendered an unconditional judgment holding plaintiffs liable for the tax. For purposes of our review we must assume that the judgment conforms to state law. Hence we are called on to determine only federal questions properly raised on the record. Considering the only question of the tax immunity of the United States which is so raised, we decide for reasons already stated that the tax now laid and sustained imposes no unconstitutional burden on the federal Government. No question arising under the Fourteenth Amendment is raised by the record either in the state courts or here, and we are without jurisdiction to pass upon it.*

* Even if the opinion of the Supreme Court of Arkansas had proceeded on a ground so unexpected as to make timely, by petition for rehearing, the raising of the federal questions now for the first time advanced, compare Saunders *v.* Shaw, 244 U. S. 317; Ohio *v.* Akron Park District, 281 U. S. 74, 79, plaintiffs in their petition for rehearing did not suggest them.

A further question is whether the lands in the forest reserve, which were purchased for that purpose by the United States, are within the territorial taxing jurisdiction of the state. The answer turns on the interpretation of the statute of the United States authorizing the acquisition of the lands, §§ 7 and 12 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. §§ 480, 516, and of the state statute of Arkansas authorizing the sale. Pope's Digest, § 5646. The meaning of both statutes, as applied in this case, is a federal question, since upon their construction depend rights, powers and duties of the United States. *Mason Co.* v. *Tax Comm'n*, 302 U. S. 186, 197, and cases cited.

The statute of Arkansas consenting to the purchase of forest lands by the United States, provided that the state should "retain a concurrent jurisdiction with the United States in and over lands so acquired . . . ", to issue and execute "civil process in all cases, and such criminal process as may issue under the authority of the State . . . ". It made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions. Any doubt as to the effect of such a grant by the state in conferring exclusive legislative jurisdiction over the territory which is acquired by the Federal Government is removed by the provisions of the federal statute.

Section 12 of the federal statute, authorizing the purchase, provided:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State, wherein such land is situated, shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants "be absolved from their duties

as citizens of the State". Compare *Mason Co.* v. *Tax Comm'n, supra*; *Atkinson* v. *Tax Comm'n*, 303 U. S. 20; *Collins* v. *Yosemite Park*, 304 U. S. 518, 528; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 99.

Our conclusion, based on the construction of the interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States.

What we have said of the argument that the tax assessed on plaintiffs is an unconstitutional burden on the Government, is applicable to the tax assessed for severance of timber from forest reserve lands which, from the beginning, have been a part of the public domain. That tax is likewise valid if the state has legislative jurisdiction over such lands within its boundaries.

Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c. 100, 5 Stat. 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. *Ft. Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 539; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404. Such authority did not pass to the United States by virtue of the provisions of Article I, § 8, cl. 17 of the Constitution, which authorize it "to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be".

Since the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the constitutional provision, and there has been no cession of jurisdiction by the state. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651; *Mason Co.* v. *Tax Comm'n, supra*, 240. Although Arkansas has, by § 5647, Pope's Digest, conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands acquired by the United States in Arkansas, it has ceded exclusive legislative jurisdiction neither over lands reserved by the United States from the public domain nor over lands acquired in the state. *Ft. Leavenworth R. R. Co.* v. *Lowe, supra*, 530, 531. It follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve.

We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States or were acquired by the United States by purchase, and that the tax assessed against plaintiffs is not subject to any constitutional infirmity, or to any want of taxing jurisdiction of the state to lay it with respect to transactions on the federal forest reserve located within the state.

The judgment is reversed insofar as it adjudged plaintiffs not liable for the tax on severance of timber from lands held by the United States as original owner, and the cause is remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this opinion. In all other respects the judgment is affirmed. On the remand the state courts will be free, so far as their own practice allows, to determine any state questions here involved and any federal questions not already decided by this opinion. Compare *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, with *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113.

So ordered.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice RUTLEDGE, dissenting.

In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants.[1] As I understand the opinion this rests on the view that the Arkansas Supreme Court decided that the statute[2] directs the tax to be thus levied, whether or not the lien and collection provisions are applicable to the United States and, so taking its action, that the tax as applied is constitutional. I cannot accept this view of the Arkansas court's decision or of the validity of the tax in its present application. In my judgment the cause should be remanded to the state court for it to determine the applicability of the lien and collection pro-

[1] On the jurisdictional discussion of the Court the appellants are, of course, petitioners on certiorari.

[2] Pope's Digest Ark. (1937) §§ 13371-13395. The statute was first enacted in 1923. Acts of Arkansas, 1923, Act 118. It was materially amended in 1929, but its essential scheme remained the same. Acts of Arkansas, 1929, Act 283.

Corrected Copy.

SUPREME COURT OF THE UNITED STATES.

Nos. 328 and 329.—October Term, 1945.

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellants,	
328 *vs.*	
Otho A. Cook, Commissioner of Revenues for the State of Arkansas.	Appeal from and Writ of Certiorari to the Supreme Court of Arkansas.
Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner,	
329 *vs.*	
Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company.	

[March 4, 1946.]

Mr. Justice Rutledge, dissenting.

In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants.[1] In my judgment the cause should be remanded to the state court for it to determine the applicability of the lien and collection provisions to the United States, or their severability, and in the light of that determination to ascertain the constitutional validity of the tax as applied to appellants. These issues are inescapable on the record in this case. For until they are determined any decision here can affect only a tax of uncertain incidence, unless the Court in sustaining it means to rule, as I think the Arkansas court ruled, that the tax is valid whether or not the statute's lien and collection provisions[2] apply to the United States as owner of the land and the severed timber.

[1] On the jurisdictional discussion of the Court the appellants are, of course, petitioners on certiorari.

[2] Pope's Digest Ark. (1937) §§ 13371-13395. The statute was first enacted in 1923. Acts of Arkansas, 1923, Act. 118. It was materially amended in 1929, but its essential scheme remained the same. Acts of Arkansas,

Neither course is properly open to us. Since the Arkansas court, as this Court's opinion does not dispute, has sustained the tax without deciding whether the lien and collection provisions are severable and inapplicable to the United States, we are completely at loss to know whether the tax rests ultimately upon the Government, as it does under Arkansas law on all other owners not expressly exempted. Consequently we have no determinable issue, but only a speculative inquiry of a sort beyond the tradition and, in my opinion, the jurisdiction of this Court to decide. On the other hand, if the effect of the decision here, as in the Arkansas court, is to sustain the tax regardless of whether the lien and collection provisions apply in whole or in part to the United States, the result is substantially to sustain a tax laid by the state directly on the Government. This result is as unacceptable as to render an advisory opinion upon the validity of a tax of uncertain and speculative application.

From *McCulloch* v. *Maryland*, 4 Wheat. 316, to now the rule has remained that the states are without power, absent the consent of Congress, to tax the United States, whether with reference to its property or its functions. *United States* v. *Allegheny County*, 322 U. S. 174, 177. That rule is of the essence of federal supremacy. It is not to be chipped away by ambiguous decisions of state courts or easy assumptions relating to their effects which ignore the direct impact of state taxes where they have no right to strike.

This is true regardless of the vagaries of decision, at different periods, in allowing expansion of the Government's immunity to include others. Recent recessions from former broad extensions of this kind have settled that ultimate economic incidence upon

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1929, Act 283. See notes 4-6, 9-12, and text, for the substance and effects of the provisions.

Although, as I read its opinion, the Arkansas court carefully refrained from ruling upon their severability and therefore also their applicability to the Government (see text *infra*), the lien and collection provisions were before it, were cited in the opinion, and were necessarily involved in the issues presented. The Court appears to have ruled that the tax is valid as applied to the appellants regardless of whether these provisions are severable or are applicable to the United States. That it did so furnishes no ground for believing that the issues relating to them were not presented or were waived. The petition for rehearing, as well as the opinion itself, demonstrates the contrary. The first ground set forth was: "The Court erred in holding that the tax was not a direct tax on the United States."

the Government of a state tax laid upon others is not alone enough to invalidate the tax. *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; see *Penn Dairies* v. *Milk Control Com'n*, 318 U. S. 261, 269.[3] But this does not mean either that such incidence of the tax is irrelevant to its validity or that all state taxes purporting to be laid upon others but in fact reaching the Government are valid.

It is still true that "the taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford*, 310 U. S. 41, 52; *Federal Land Bank* v. *Bismarck*, 314 U. S. 95. If the person who must pay the tax in the first place is required by the taxing statute to collect the tax or an equivalent amount from the United States, the tax is upon the United States. "State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one." *United States* v. *Allegheny County*, 322 U. S. 174, 189. Although the Court has gone far in permitting the states to force one private person to act as tax collector for another, cf. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *General Trading Co.* v. *Iowa Tax Com'n*, 322 U. S. 335, and dissenting opinion at 339, that device cannot be utilized by the states to lay taxes on the United States. Nor has it been held heretofore, if it is now, that a tax purporting to be laid upon a private individual or concern is valid regardless of whether the provisions of the state taxing statute for passing on the tax to another are applicable to the United States or are valid if so applied.

I am unable to comprehend the effect of the Court's decision. If it is ruling *sub silentio* or *ex hypothesi* that the lien and collection provisions of the Arkansas statute, for any application to the Government, are inapplicable or severable, we have no right to make such a decision. That is the business of the Arkansas courts. If the ruling is that the tax is valid even though those provisions are applicable to the United States, then for the first time the Court is overruling the basic principle of *McCulloch* v. *Maryland*. If the decision is, finally, that the tax is valid whether

[3] See Powell, The Waning of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 633; Powell, The Remnant of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 757.

or not the lien and collection provisions are applicable or severable, then it embodies both faults.

I do not think the Court means to overrule *McCulloch* v. *Maryland*. Nor does it purport to interpret or determine the Arkansas law concerning either applicability or severability of the statute's provisions. But unless it is doing this, without so stating, I see no escape from the other horn of the dilemma. Either the tax as applied is valid or it is invalid. Whether it is valid or not depends on whether the lien and collection provisions apply to the United States, for they place the tax directly upon the owner. That issue is inescapable in this case, whether in the Arkansas court or here.

I do not think the Arkansas court decided either that the lien and collection provisions are inapplicable to the United States or that they are severable from the remainder of the statute, notwithstanding it had those provisions before it, cited them though without ruling upon them, and proceeded to sustain the application of the tax to appellant. I think it clear that the court avoided making such a ruling. In my opinion the Arkansas decision in effect, though not in words, was that the tax is valid regardless of whether the enforcement provisions apply to the United States, which in effect was to rule that the tax had been constitutionally applied even though the collection provisions are applicable to the United States, to the extent at least of the withholding provisions.

My reasons for this view are several. In the first place, the court's opinion, though noting the collection and lien provisions and the contract's term that title to the severed timber should remain in the Government "until it has been paid for, and scaled, measured or counted," does this in the introductory statement of the case and then proceeds through a lengthy discussion without again referring to those provisions.

Moreover they provide plainly that where the severer is different from the owner, the former must pay the tax but he is required to pass it on to the owner.[4] A further provision requires him to withhold the amount of the tax from any money or

[4] Pope's Digest Ark. § 13382 provides: "The reporting taxpayer *shall* collect or withhold *out of the proceeds of the sale* of the products severed the proportionate parts of the total tax *due by the respective owners of such natural resources* at the time of severance." (Emphasis added.)

severed property in kind due the owner under their contract.[5] Another section gives the state a lien on the severed resources for the tax and penalties.[6] The clear effect of the provisions requiring "the reporting taxpayer" to "collect or withhold" the amount of the tax from the owner is to give him a defense to the owner's action to recover the full contract price for the severed resources and an equally clear right of action against the owner for the amount of the tax.

Thus the scheme of the tax is to place both its ultimate legal and its ultimate economic incidence on the owner. The tax in terms is "due by the respective owners of such natural resources."[7] It is "a privilege tax or license tax; and is levied on the business of severing," as the Arkansas court declared in this case. — Ark. —, —, 187 S. W. 2d 7, 12. But it is ultimately, as that court has also declared, though not expressly in this case, a privilege or license tax levied upon *the owner's* business of severing, for it applies to him whenever he severs or permits severance for sale; and "sale" includes turning over the timber to one who clears the land as payment for the clearing, although his purpose in doing this is only to make the soil available for tilling.[8]

Moreover, as the Arkansas court did hold specifically in this case, the act contains only two exemptions, neither of which ap-

[5] The provision reads: "Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owners of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered *and required* to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment." Pope's Digest Ark. § 13382. (Emphasis added.)

"Producer" is defined as every person, firm, corporation or association of persons "engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine, and all other forest products and all other natural products of the soil or water of Arkansas." Pope's Digest Ark. § 13371.

[6] Pope's Digest Ark. § 13376: "The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources."

As the section was enacted originally in 1923 the provisions for attachment of the lien to machinery, etc., used in severing was not included. This was added by amendment in 1929. Cf. note 2.

[7] See note 4.

[8] See note 11.

plies to the United States.[9] And on this ground, together with the maxim *expressio unius*, it ruled the act applicable to the severance of timber "in all instances except the two exemptions mentioned."[10]

That ruling, it seems to me, is especially significant when it is considered not only in the light of the court's failure to make further reference to or ruling upon the collection provisions, but also in view of the Arkansas court's previous decisions. Thus in *Miller Lumber Co.* v. *Floyd*, 169 Ark. 473, 480, the court held: "Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner *must* pay the severance tax; for such contractor and his servants who actually sever the timber *act for the owner on the premises, and their act of severing* the timber *is the act of the owner*."[11] (Emphasis added.)

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[9] One was for the individual owner who occasionally severs in order to build or repair improvements on the premises or for his own use and another for the "producer of switch ties" who hews them out entirely by hand. — Ark. —, —, 187 S. W. 2d 7, 10.

[10] The decision held the tax invalid as applied to the severance from lands held by the United States as original owner, though not as to those purchased with the state's consent.

[11] The effect of the quoted statement is emphasized by its context, in part as follows: "It is apparent then that the owner of lands, who cuts down trees for the purpose of building fences or repairing and constructing houses and other improvements on the land from the timber thus severed from the soil is exempted from paying the tax. It is equally evident that when the timber severed from the soil is sold, it falls within the terms of the act, and the tax must be paid by someone. To illustrate: if the owner of timber lands desired to sever it for the purpose of clearing the land and putting it in cultivation and hired other persons to sever the timber for him, he would be required to pay the severance tax. If the owner should lease his land to another person for a designated number of years in order to have his lessee clear the land and put it in cultivation, and if the consideration for the lease in whole or in part was that the lessee should have the timber so removed from the land, the severance tax would have to be paid by such lessee. It will be noted that the language of the act is specific on this subject and provides that the severer or producer as he is called shall pay the tax. The act is very broad and comprehensive, and is levied upon all persons engaged in severing the timber from the soil for sale or commercial purposes, regardless of the purpose for which it is done. The only exception is that the tax shall not be paid where the timber severed is actually used in erecting or repairing structures and other improvements on the land. The application of the timber in part payment for clearing the land is a severing of it for commercial purposes, although the primary purpose of severing it is to enable the land to be put in cultivation. Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner must pay the severance tax; for such contractor and his servants who actually sever the timber act for the owner in the premises, and their act of severing the timber is the act of the owner."

In a previous appeal in the same case, 160 Ark. 17, the court had sustained the act as constitutional on the theory that it was a privilege tax and not a property tax.

No reference was made in this case to the *Miller* case. In the absence of one we cannot assume that the court intended to overrule that decision or to destroy its rationalization or universal applicability, except for the specific exemptions. Not only the opinion in this case, as much by it's omissions as by what it expressly rules, but also the Arkansas court's prior decisions, give every ground for believing that it did not intend either to apply the tax differently in this case than in any other, or to overrule its prior determinations of the ultimate nature, character and incidence of the tax.[12]

The majority seem to imply however that this may be exactly what was done; that perhaps the Arkansas court held that since the tax would be unconstitutional if, as the statute contemplates, it were directly placed upon the Government as owner, it would treat the tax as falling not on the Government but on the severer alone. As has been stated, nothing in that court's opinion suggests such a ruling. And if there were either a ruling or a sufficient suggestion of this sort, it would raise other serious questions, not considered by that court or here, concerning the validity of the tax. The effect of such a holding would seem to be to single out contractors with the Government for the imposition of a tax not placed on other severers. All other contractors, by the terms of the statute and the Arkansas decisions, would be required to pass the tax along to owners. Only contractors with the Government would not be allowed or required to do this. Thus to treat the tax as applicable only to the severer in this case, and the collection provisions affecting the owner as severable and inapplicable, would raise serious questions of discrimination, which neither the Arkansas court nor this court has considered and which appellants are entitled to have determined.

[12] This view is sustained also by the court's expressed view that "Imposition of the tax here does not in any sense interfere with the Government's business." — Ark. —, —, 187 S. W. 2d 7, 12. The statement could mean that the tax would not be applied to the Government as to other owners, in which event a severance of the collection provisions would be implied. That it does not have this meaning is evidenced, I think, by the court's reliance on James v. Dravo Contracting Co., *supra*, where quite different statutory provisions were in question. The court's misapplication of the *Dravo* case was, I think, but a reflection of its implicit idea that the tax would be valid since it was collected immediately from the appellants, even though they might pass on its economic burden to the Government, without regard to how that might be done.

It is true that they have not raised here any question of discriminatory enforcement. But this is because they had no reason to believe that the Arkansas court had applied, or would apply, the statute differently to them than to others or to anticipate the character of the ruling now made. It is doubtful, to say the least, that the Arkansas legislature could place a severance tax exclusively upon persons who sever resources from governmentally owned land. The same doubt would apply to the state court's effort to make the statute so effective, were it to undertake doing this. In my judgment it has not done so. Whether or not such an effort ultimately would be successful, appellants are entitled to be heard upon the question before that result is achieved. They should not be deprived of this opportunity through this Court's upholding of an ambiguously applicable statute or in advance of a decision by the only court which can remove the ambiguity. Because the Arkansas court has not passed upon applicability or severability of the collection provisions as they affect the owner, and because it has not determined the validity of the tax as applied in the light of such a determination, I think the cause should be remanded to it, so that the former questions may be authoritatively determined before we undertake to decide, upon the wholly speculative basis now presented, whether the tax as applied is valid.